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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

EVELYN FALKOWSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
PAUL M. BATOR
Deputy Solicitor General
SAMUEL A. ALITO, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. 701-706, authorizes judicial review of the Department of Justice's decision not to provide legal representation for a federal employee who was sued for damages in her individual capacity for actions undertaken on the job.

2. If the Department's decision is subject to review, whether the court of appeals applied the proper scope of review in overturning that decision.

PARTIES TO THE PROCEEDING

The United States Department of Justice is the only petitioner, and Evelyn Falkowski is the only respondent. The Equal Employment Opportunity Commission was a defendant-appellee below, but we do not seek review of any portion of the court of appeals' judgment affecting the Commission (see note 3, *infra*).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 719 F.2d 470. The opinion on denial of rehearing (App., *infra*, 35a-38a) is not yet reported. The opinion of the district court (App., *infra*, 28a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1983. A petition for rehearing was denied on January 12, 1984. By order of April 5, 1984, the Chief Justice extended the time within which to file

a petition for a writ of certiorari until June 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, as well as the statutes (28 U.S.C. 516, 517, 519) and regulations (28 C.F.R. 50.15, 50.16) that govern the provision of government legal representation for federal employees who are sued in their individual capacities, are reprinted at App., *infra*, 39a-47a).

STATEMENT

1. This case grows out of an acrimonious, decade-long dispute between two employees of the Equal Employment Opportunity Commission (EEOC): respondent Evelyn Falkowski, formerly director of the Birmingham, Alabama, office, and Bertram Perry, formerly the deputy director of that office. Respondent was appointed to her position in the Birmingham office in 1974 pursuant to a consent decree settling her suit against the EEOC for sexual discrimination. Shortly after her transfer, the conflict with Perry began. App., *infra*, 3a. "Perry alleged that the friction stemmed from his justified protests against [respondent's] mismanagement," while respondent attributed the conflict to "rank insubordination" and Perry's "oppressive behavior" (*ibid.*).

The EEOC attempted to transfer both respondent and Perry, but both brought suit to block their transfers (App., *infra*, 4a). Respondent, who is white, first filed administrative complaints charging her black, male superiors in the EEOC with sexual and racial discrimination (*id.* at 4a n.2). She then brought suit in the United States District Court for the Northern District of Alabama, alleging breach of the 1974 consent decree (*id.* at 4a). Perry, who is black, sued respondent and

other EEOC supervisors in the same court, claiming racial discrimintion and retaliation for "whistle-blowing" (*ibid.*). See *Perry* v. *Golub*, 400 F. Supp. 409 (N.D. Ala. 1975), vacated as moot, 594 F.2d 862 (5th Cir. 1979). After a hearing in which EEOC attorneys represented respondent and the other defendants, the district court enjoined Perry's transfer; respondent's transfer was likewise suspended by informal agreement (App., *infra*, 5a).

In 1976, the district court dismissed respondent as a defendant in Perry's suit. Respondent unsuccessfully appealed the dismissal, claiming that the EEOC attorneys had inadequately represented her and that she wished to remain in the case to clear her name (*ibid.*). Since then, "[n]umerous other controversies have emerged in the *Perry* v. *Golub* litigation" (App., *infra*, 6a).

2. In the meantime, respondent set out to gather evidence of Perry's insubordination. Without Perry's knowledge she recorded a conversation with Perry in her office in 1977. The recording revealed not only insubordination but "a regrettable stream of obscenities and racial epithets" on Perry's part. App., *infra*, 7a. As a result of this incident, the EEOC sought (unsuccessfully) to discharge respondent for violating its rule barring such recordings (EEOC Order 165); it also moved (unsuccessfully) to discharge Perry based on the contents of his remarks. App., *infra*, 7a.

Perry then filed suit in the Northern District of Alabama against respondent and EEOC chairwoman Eleanor Holmes Norton. In 1981, Perry obtained voluntary dismissal of this action. Respondent unsuccessfully sought leave to file counterclaims against Perry; she also failed in her efforts to recover costs and attorneys fees from Perry and the Commission. App., *infra*, 8a; see *Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D.

Ala. July 22, 1981), aff'd, No. 81-7643 (11th Cir. Oct 25, 1982), cert. denied, No. 82-1914 (Oct. 3, 1983).

3. After Perry filed his second suit against respondent, respondent requested that the government provide her with legal representation (App., *infra*, 11a). After some delay, the EEOC, in accordance with the applicable regulations (28 C.F.R. 50.15, 50.16), sent the Department of Justice a letter requesting representation for respondent and certifying that "'although [respondent] acted improperly [in recording the conversation] she was acting within the scope of her duties.'" C.A. App. 102-103; App., *infra*, 11a-12a.

The Department of Justice denied the representation request. In a letter to respondent and the EEOC, Assistant Attorney General Barbara Babcock of the Civil Division explained (App., *infra*, 12a):

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of the United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15(a)(2), I am denying Ms. Falkowski's request.

4. Respondent then brought suit against the EEOC and the Justice Department in the United States District Court for the District of Columbia. Among other things, she claimed that the Justice Department had violated the Administrative Procedure Act, 5 U.S.C. 706, by arbitrarily and capriciously refusing to provide her with legal representation in *Perry* v. *Falkowski*, *supra*.[1]

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[1] She also alleged that the EEOC had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*,

The district court granted summary judgment for the government, holding that Assistant Attorney General Babcock's letter set forth adequate reasons for her conclusion that providing representation would not be "in the interest of the United States" (App., *infra*, 30a).[2] The court therefore found it unnecessary to address the government's contention that its decision not to furnish representation was exempt from judicial review under the APA (*ibid.*).

5. The court of appeals reversed the summary judgment on respondent's claim against the Justice Department (App., *infra*, 21a-26a).[3] The court held that the

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by denying her adequate government legal representation in *Perry* v. *Golub*, *supra*, and by improperly handling her request for representation in *Perry* v. *Falkowski*, *supra* (App., *infra*, 13a, 28a-29a).

Respondent further alleged violations of the First and Fifth Amendments. These constitutional claims were dismissed by the district court, and respondent did not contest their dismissal on appeal. App., *infra*, 13a n.11.

[2] The court also granted summary judgment for the EEOC and the Justice Department on respondent's Title VII claims (see App., *infra*, 28a-30a). The court held (*id.* at 28a n.1) that respondent's claim regarding the representation provided in *Perry* v. *Golub*, *supra*, was barred because respondent did not file an administrative complaint with the EEOC within the time required. With respect to respondent's claim regarding the EEOC's handling of her request for representation in *Perry* v. *Falkowski*, *supra*, the court noted (App., *infra*, 29a-30a) that the EEOC had done all that it could by asking that the Justice Department grant respondent's request and by providing the Department with the necessary information.

[3] The court of appeals affirmed the grant of summary judgment in favor of the EEOC on respondent's Title VII claim regarding the government representation provided in *Perry* v. *Golub*, *supra* (App., *infra*, 16a-19a). The court held (*id.* at 18a) that respondent was collaterally estopped from asserting that claim by virtue of an adverse decision on that issue in the *Perry* v. *Golub*, *supra*, litigation itself.

The court reversed the grant of summary judgment for the EEOC on respondent's Title VII claim regarding the EEOC's

Department's decision not to provide representation was subject to judicial review under the APA and did not fall within the exception in 5 U.S.C. 701(a)(2) for action "committed to agency discretion by law" (App., *infra*, 21a n.16). In reaching this conclusion, the court relied on *Natural Resources Defense Counsel, Inc.* v. *SEC*, 606 F.2d 1031, 1043-1047 (D.C. Cir. 1979), in which the court concluded (*id.* at 1043-1044) that the applicability of Section 701(a)(2) "turns on pragmatic considerations," including particularly "the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review." In applying those factors here, the court opined summarily in a footnote (1) that persons denied representation are "entitled" to an agency decision that is "at least rational and free from abuse of discretion"; (2) that review could in "most" cases be "handled" at the "dismissal or summary judgment" stage and therefore will not prove burdensome; and (3) that the subject is not inappropriate for judicial review because the court's scrutiny "is in most cases limited to determining whether the reasons articulated by the agency make sense," a task which the court said is not "beyond our powers" (App., *infra*, 21a-22a n.16).

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handling of her representation request in *Perry* v. *Falkowski*, *supra* (App., *infra*, 19a-21a). The court held (*id.* at 20a-21a) that "the bare fact of formal Commission recommendation was not sufficient" and that "[t]he relevant factual inquiry instead should have been whether [the] EEOC acting out of discriminatory animus intentionally mishandled [respondent's] request so as to undercut the force of its formal recommendation on paper." Acknowledging (*id.* at 20a) that this test "places a heavy burden" on respondent, the court found (*id.* at 20a-21a) that there were genuine issues of material fact that precluded summary judgment. We do not seek review of this ruling.

The court then conducted a detailed review of the government's reasons for refusing to provide representation in this case (App., *infra*, 22a-25a) and concluded that those reasons were "facially insufficient" (*id.* at 21a). The court found that "'the clearly personal nature of the dispute between [respondent] and Mr. Perry'" did not provide a "rational reason" for denying representation because "government counsel represent federal officials as defendants in quite acrimonious Title VII actions on a regular basis" (*id.* at 23a). The court likewise concluded that respondent's violation of an EEOC rule by surreptitiously tape recording the conversation with Perry could not justify the government's refusal to provide her with representation because the government has sometimes paid for private counsel to represent federal officials who were sued in their individual capacities and who also happened to be under federal criminal investigation at the time (*id.* at 23a-24a). The court held that representation could not be denied to respondent on the basis of the overlapping suits in which she and Perry were challenging the EEOC's efforts to discharge them (*id.* at 24a-25a). The court stated (*id.* at 24a) that this rationale was "the least satisfactory" and "appear[ed] retaliatory."[4] Finally, the court suggested that respondent was accorded "disparate treatment" because the court's extra-record review of the government's handling of representation requests indicated that denials "were apparently few and far between" (*id.* at 25a).

The government's petition for rehearing was denied with Judges Bork, Scalia, and Starr voting for rehear-

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[4] The court also rejected the government's argument that respondent's claim for reimbursement of attorney's fees was barred by sovereign immunity (App., *infra*, 26a n.16). Although we disagree with the court's holding, we do not seek review of this question.

ing en banc (App., *infra*, 33a-34a). In a statement joined by Judge Scalia, Judge Starr wrote (*id.* at 36a):

> In my view a court cannot appropriately demand reasons for litigation decisions statutorily entrusted to the Attorney General or his representatives in order to evaluate judicially whether those decisions, in the panel's words, "make sense" under the APA.

Observing (*id.* at 35a) that this case involves "an issue of * * * grave importance under bedrock principles of separation-of-powers," he added (*id.* at 36a):

> This intrusion by the Article III branch into the discretionary judgments of a coordinate branch is particularly sensitive in the context of reviewing litigation decisions by the Executive, where various considerations of policy, tactics and the allocation of limited resources require complex and delicate balancing.

He also noted (App., *infra*, 36a) that the statutory provision in question not only empowers the Attorney General to provide government legal representation for federal employees who are sued but also authorizes him "to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by [other parties]." Judge Starr observed (*id.* at 36a n.3) that "the panel [did] not offer any rationale limiting judicial review of actions by the Attorney General under section 517 to decisions to represent government employees."

REASONS FOR GRANTING THE PETITION

This case presents questions of great importance with respect to judicial review of discretionary government decisions under the Administrative Procedure Act, 5 U.S.C. 701-706. Although the APA does not authorize judicial review of actions "committed to agency discretion by law" (5 U.S.C. 701(a)(2)), the Untied States Court of Appeals for the District of Columbia Circuit appears to be in the process of reading this ex-

ception out of the law, so that even the government's litigation decisions—paradigm examples of actions hitherto regarded as purely discretionary—have been held subject to review. In *Chaney* v. *Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), petition for cert. pending, No. 83-1878, the court held that the Food and Drug Administration's decision not to undertake investigative or enforcement action regarding the use of lethal injections to administer death sentences was subject to judicial review. On the same day, the court in this case reached the startling and wholly unprecedented conclusion that the Justice Department's decision not to provide legal representation for a federal employee sued in her individual capacity was likewise reviewable under the APA. These decisions in themselves are harmful to important government interests. More important, they are symptomatic of the District of Columbia Circuit's erroenous approach to the question of the reviewability of purely discretionary executive decisions, a question that deeply implicates the doctrine of separation of powers. Equally extreme results may be expected as long as that approach remains uncorrected. This is obviously a matter of great importance, and affects all of those government agencies whose discretionary actions may be reviewed in the District of Columbia Circuit.

Consideration of this case together with *Chaney* will, we believe, assist the Court in assessing whether the lower courts have correctly understood and applied the doctrine of nonreviewability of purely discretionary executive decisions. *Chaney* and this case each throw a different sort of light on the problem. *Chaney* relates to the implementation of an administrative enforcement program, while this case involves the classical executive function of determining whether the government should participate in litigation.[5]

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[5] *Chaney* also involves other substantial questions and, accordingly, may be decided on other grounds if review is granted.

1. The court of appeals' decision allowing judicial review under the Administrative Procedure Act (5 U.S.C. 701-706) of the government's refusal to furnish legal representation for a federal employee sued in her individual capacity is clearly wrong.[6] Under the APA, 5 U.S.C. 701(a)(2), final agency action is not subject to judicial review if it is "committed to agency discretion by law." This bar to judicial review applies where the governing "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. 752, 79th Cong., 1st Sess. 26 (1945)). In making this determination, "the ultimate analysis is always one of Congress's intent" (*Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979). See also *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960). Cf. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984).

Like *Chaney*, this is a case in which Congress has provided "'no law to apply'" and clearly did not intend to authorize judicial review. Under 28 U.S.C. 517, the Attorney General is authorized to send any officer of the Department of Justice "to attend to the interests of the United States" in any suit pending in federal or state court. Other federal statutes (28 U.S.C. 516, 519) vest the Attorney General with the authority to conduct and supervise litigation in which a federal officer is a defendant. None of these statutes, however, contains

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[6] This case is limited to the question of review under the APA, which permits agency action to be set aside if it is "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2)(A)). As illustrated by respondent's second claim against the EEOC under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (see App., *infra*, 19a-21a), an employee may contest the denial of representation on grounds of race, color, religion, sex, or national origin. 42 U.S.C. (& Supp. V) 2000e-16.

the slightest hint that Congress intended to confer upon individuals, such as respondent, the right to contest the Attorney General's exercise of this authority. Moreover, all of the statutes are "written in the language of permission and discretion" (*Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. at 455). No statute requires the Attorney General to provide legal representation for every—or indeed for any—federal employee who is sued in his individual capacity. Nor does any statute provide standards for determining when such representation should be furnished, other than the direction in 28 U.S.C. 517 that the Attorney General should "attend to the interests of the United States." "[T]he permissive terms in which [these] provisions are drawn * * * persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the intervention of the courts'" (*Schilling* v. *Rogers*, 363 U.S. at 674, quoting *Work* v. *Rives*, 267 U.S. 175, 182 (1925)).

It is also significant that these are not narrow statutes dealing solely with the provision of legal representation for federal employees who are sued. Instead, they are the same provisions that confer upon the Attorney General the broad authority to conduct the government's litigation. As Judge Starr observed (App., *infra*, 36a), it is upon these provisions that the Attorney General must rely when he decides "to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by parties other than the United States in courts around the nation." If Congress did not intend to authorize judicial review of the latter decisions—and any such suggestion would be truly revolutionary—it seems quite unlikely that Congress meant to permit judicial review of the decision involved in this case, which was taken under the identical statutory authority.

The purpose and origins of these statutory provisions provide further persuasive proof that Congress never intended to authorize judicial review. As this Court has stated (*Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976)): "[a]

lawsuit is the ultimate remedy for a breach of the law, and it is to the President * * * that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3." In the first Judiciary Act, the authority to litigate on behalf of the United States was delegated to the Attorney General and the United States Attorneys. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92. In succeeding years, with the growth of government litigation, other officers in various departments were appointed to conduct suits for the government, and in many instances private attorneys were retained. See Cong. Globe, 41st Cong., 2nd Sess. 3035 (1870). The Department of Justice was created in 1870 to centralize all government litigation in one department under the Attorney General's direction (*ibid.*; Act of June 22, 1870, ch. 150, 16 Stat. 162). The statutes at issue here derive from Section 5 of that Act (16 Stat. 162).[7] Their purpose and effect was to delegate to the Attorney General and his appointees the re-

[7] Section 5 of the Act provided in pertinent part:

> [T]he Attorney General may, whenever he deems it for the interest of the United States, conduct and argue any case in which the government is interested, in any court of the United States, or may require the solicitor-general or any officer of his Department to do so. And the solicitor-general, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

This provision was codified as Rev. Stat. 361 and 367 (1874 ed.), which were later enacted in modified form as 5 U.S.C. (1940 ed.) 306 and 316 and still later as 28 U.S.C. 516 and 517. 28 U.S.C. 519 is of more recent origin. Act of June 25, 1948, ch. 646, § 507, 62 Stat. 910. The portion of that statute relevant here, which authorizes the Attorney General to "supervise" government litigation, overlaps 28 U.S.C. 507, which authorizes him to "conduct" such litigation. There is no indication whatsoever that this supervision was intended to be supervised in turn by the judiciary.

sponsibility, conferred upon the President in Article II, Section 3 of the Constitution, for conducting the government's litigation. Cong. Globe, 41st Cong. 2d Sess. 3035-3039, 3065-3067, 4490-4491 (1870). There is nothing in the language or the legislative history of these statutes that suggests that Congress wished to subject the exercise of that authority to court supervision.

Finally, as Judge Starr pointed out (App., *infra* 35a-36a), the doctrine of separation of powers reinforces the conclusion that Congress did not mean to authorize judicial review of the executive's litigation decisions. It is the responsibility of the courts to decide cases, not to judge whether the executive's decision whether or not to participate in litigation "make[s] sense" (*id.* at 22a n.16). Arrogation of such authority would cast the judiciary in conflicting dual roles. Just as the Constitution's system of checks and balances would be eroded if the executive undertook to adjudicate cases and controversies, the doctrine of separation of powers is infringed by judicial supervision of the government's decision whether or not to conduct litigation, either on its own behalf or at the behest of one of its employees. Because Congress legislates against the background of these fundamental constitutional postulates, a conclusion that Congress intended to authorize judicial review here should not be reached in the absence of a clear and explicit congressional command.

2. Even if it is assumed that "law to apply" may be found in an agency's regulations, as well as its governing statutes, the applicable policy guidelines in this case (28 C.F.R. 50.15) provide no workable standards under which decisions regarding representation could be reviewed by the courts. The policy statement establishes a few eligibility requirements for representation: the employee must "be sued, subpoenaed, [or] charged" in "civil [or] Congressional proceedings [or] in state criminal proceedings" (28 C.F.R. 50.15(a)), and the employee must not be a defendant in a related federal criminal case or the subject of a related federal criminal

investigation (28 C.F.R. 50.15(a)(4) to (6)). If these threshold requirements are met, the Department of Justice "may" provide representation when that is "in the interest of the United States" (28 C.F.R. 50.15(a)).[8] Determining whether something is "in the interest of the United States" seems a classic example of a decision "committed to agency discretion by law" and thus not subject to review under the APA.

At most, the policy statement suggests two broad criteria to be used in making representation decisions. First, representation by a government attorney may be precluded if there are conflicts between the legal and factual positions of employees in the same case. See 28 C.F.R. 50.15(a)(9).[9] Second, the government may decline to provide or pay for representation if the employee's legal position conflicts with the interests of the United States. See 28 C.F.R. 50.15(a)(7)(ii); 28 C.F.R. 50.16(a).

Neither of these criteria provides an appropriate basis for judicial review. If the government denied representation due to a conflict between employees, it would often be difficult for the government to explain its decision without disclosing confidential information furnished by one of the employees and protected by the attorney-client privilege. Similarly, if representation were withheld or terminated because the employee's legal position conflicted with broader government litigation strategy, the deliberative process and attorney-client privileges would make a full explanation difficult if not impossible. Sending government lawyers into court to represent federal employees who are sued in their individual capacities is not simply the provision of

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[8] It is noteworthy that neither the statute nor the regulations in any way use the language of "rights" or "entitlements"; they clearly do not contemplate giving the employee any sort of private "right" to be represented.

[9] In this situation, private counsel may be furnished at government expense, if funds are available. 28 C.F.R. 50.16(a).

an employment benefit, like sick leave or retirement pay. Rather, such representation is closely tied to the government's overall litigation strategy. For example, government attorneys, even when representing individual defendants, are not authorized to advance arguments that would be harmful to the government's broader interests. Thus, judicial review of the government's representation decisions will almost inevitably lead to court supervision over the details of the government's litigation decisions and strategy—matters entrusted squarely to the discretion of the executive and traditionally protected by privilege.

The court of appeals' intrusion in this case into one aspect of the government's discretionary decision-making in the area of litigation is matched by the court's intrusion in *Chaney*, where the court allowed judicial review of an agency's discretionary decision regarding the way in which its limited enforcement resources might best be employed. That the court's precedents have led to judicial review of even these purely discretionary determinations is a clear warning that the court's approach to the question of when review is appropriate has gone fundamentally awry. If the question at issue here—the correctness of the Attorney General's decision whether providing legal representation is or is not in the interest of the United States—is not a question "committed to agency discretion by law," it is hard to think of any case that could fall into that category.

3. Both *Chaney* and this case resulted from the court of appeals' effective abandonment of the legal standard prescribed in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. at 410, *i.e.*, whether the governing "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" By some strange chemistry, the District of Columbia Circuit has concluded that the search for "law to apply" should not focus upon the statutory language or even upon Con-

gress's intent as evidenced in the legislative history. Instead, the court consistently applies the following test:

> [t]he determination of whether there "is law to apply" turns on such *pragmatic considerations* as whether judicial supervision is necessary to safeguard plaintiffs' interests, whether judicial review will unnecessarily impede the agency in effectively carrying out its congressionally assigned role, and whether the issues are appropriate for judicial review.

Chaney v. *Heckler*, 718 F.2d at 1185 (emphasis added).[10] This formulation converts a question of statutory interpretation—whether Congress intended the courts to review an agency's enforcement decisions—into an essentially standardless, legislative decision—whether, in the court's judgment, such review would be beneficial. As Judge Scalia has aptly observed, this test means that the court is free to intervene whenever it "think[s] it a good idea." *Chaney* v. *Heckler*, 724 F.2d 1030, 1031 (D.C. Cir. 1984) (dissent from denial of rehearing). And the court of appeals apparently thinks that review is always a good idea, except perhaps in cases where it is "beyond [its] powers" to determine whether an agency's action "makes sense." We do not think that this is what Congress had in mind in enacting

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[10] See also App., *infra*, 21a n.16; *Investment Co. Institute* v. *FDIC*, 728 F.2d 518, 526 & n.6 (D.C. Cir. 1984) (majority of panel expresses "discomfort with the test" to which circuit is bound); *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 39-45 & nn.10, 13 (D.C. Cir. 1983) (literal application of *Overton Park* test provides "limited guidance"; must be supplemented by "more pragmatic analysis"); *Local 1219, American Fed'n of Gov't Employees* v. *Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982); *Natural Resources Defense Counsel, Inc.* v. *SEC*, 606 F.2d 1031, 1044 (D.C. Cir. 1979).

the APA's review section, nor what this Court had in mind in announcing the *Overton Park* formulation.[11]

4. The court of appeals' decision in this case threatens important government interests. Even if confined to decisions regarding representation of federal employees, the decision will cause serious problems. The potential for burdensome and intrusive judicial review may lead to unsound decisions regarding representation. And, as noted, when decisions denying representation are challenged, the government may often have great difficulty in explaining its actions without disclosing sensitive, privileged materials.

There is also substantial danger that the court of appeals' decision may be extended beyond the narrow area of decisions denying representation at the outset of litigation. Under the court of appeals' reasoning, all of the following decisions, which are made under the same statutory authority and pursuant to the same policy guidelines, might also be held reviewable: a decision to provide government representation rather than paying for private counsel (or vice versa); a decision to terminate representation during trial; and a decision not to

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[11] Other courts of appeals adhere far more faithfully to the *Overton Park* standard. See, *e.g.*, *California* v. *Settle*, 708 F.2d 1380, 1382 (9th Cir. 1983) (review available only if plaintiff alleges violation of "constitutional, statutory, regulatory or other legal mandates or restrictions"); *Merrill Ditch-Liners, Inc.* v. *Pablo*, 670 F.2d 139 (9th Cir. 1982) (same); *Garcia* v. *Neagle*, 660 F.2d 983, 987-989 (4th Cir. 1981) (same), cert. denied, 454 U.S. 1153 (1982); *Jaymar-Ruby, Inc.* v. *FTC*, 651 F.2d 506, 511 (7th Cir. 1981) (no law to apply where "Congress did not specify any statutory criteria"); *Board of Trade* v. *CFTC*, 605 F.2d 1016 (7th Cir. 1979) (concluding that judicial review unavailable based on statutory language, structure, purpose, and legislative history), cert. denied, 446 U.S. 928 (1980). Cf. *Hondros* v. *United States Civil Service Comm'n*, 720 F.2d 278, 292-293 (3d Cir. 1983). But see *Colon* v. *Carter*, 633 F.2d 964, 966-967 (1st Cir.1980).

appeal or seek appellate review of an adverse decision. Furthermore, it is unsettling that the statutes involved in this case are the same ones under which the Department of Justice makes broader litigation decisions, such as whether to initiate suit, intervene in litigation, or participate as amicus curiae. See App., *infra*, 35a.

Most important however, is the legal standard consistently employed by the District of Columbia Circuit in determining whether executive decisions are exempt from court review under Section 701(a)(2) of the APA. As long as that standard remains uncorrected, unjustified judicial intrusion into purely discretionary executive decisions will result. *Chaney* and this case are not aberrations; they are the logical product of the court of appeals' erroneous legal standard and the court's apparent preference, on policy grounds, for almost universal judicial supervision of how the Executive Branch exercises its discretion.

5. Even if the Department of Justice's decision not to provide legal representation was reviewable under the APA, it most certainly was not arbitrary and capricious, as the court of appeals held. The nature and scope of the review conducted by the court of appeals in this case is important in itself; it also warrants review because it will illuminate the issue of reviewability by casting light on the problems that review of government litigation decisions will inevitably entail.

a. The Department provided three sound reasons for its decision not to provide representation for respondent. First, the government properly cited (see App., *infra*, 12a) "'the clearly personal nature of the dispute between [respondent] and Mr. Perry.'" As our statement shows (pages 2-4, *supra*), respondent and Perry, two federal employees, engaged in bitter, highly personal, and lengthy litigation. For attorneys employed or paid by the government to have espoused the cause of one or both would have been most unseemly. The

government has far better uses for its limited litigation resources than to expend them by intervening in protracted and pointless personal feuds.

Second, the government noted (see App., *infra*, 12a) that the lawsuit in which respondent sought representation arose out of conduct that violated an EEOC directive. The court of appeals correctly observed (*id.* at 23a-24a) that the government has sometimes provided *private* counsel for officials despite the fact that they were under government investigation.[12] Nevertheless, the government is surely entitled to take the nature of the official's conduct into account in deciding how to employ its limited litigation resources. Officials believed to have acted properly or in good faith are obviously more deserving of representation than those who flout the government's own rules and then turn to the government for help.

Finally, the government pointed out (see App., *infra*, 12a) that *Perry* v. *Falkowski*, *supra*, substantially overlapped separate actions in which respondent and Perry were contesting the EEOC's attempt to discharge them because of the taping incident. The existence of the latter suits would have created a serious conflict of interest for any government attorney assigned to represent respondent. As a practical matter, it would have been virtually impossible for any government attorney to represent her. The court of appeals itself observed (App., *infra*, 17a n.14) in discussing respondent's claim that EEOC attorneys provided her with inadequate representation in *Perry* v. *Golub*, *supra*: "As adverse parties in related litigation arising out of the same underlying dispute, the Commission * * * [and respondent] could not be adequately represented by the same counsel as a matter of law." See

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[12] In that situation, government representation is not permitted. 28 C.F.R. 50.15(a)(6). See 28 C.F.R. 50.16(a).

also App, *infra*, 20a n.15 ("EEOC attorneys were ethically bound not to represent [respondent] in the *Perry* v. *Falkowski* suit" because "[t]he agency * * * had interests adverse to [respondent] in related litigation arising out of the same underlying dispute").

Private counsel could have been provided for respondent at government expense, but funds for that purpose are severely limited (see 28 C.F.R. 50.16(a)). Moreover, due to the overlapping nature of *Perry* v. *Falkowski*, *supra*, and the suit regarding respondent's discharge, furnishing repesentation to respondent would have effectively subsidized her litigation against the EEOC. In deciding how to allocate its limited litigation resources, the government may seek to prevent the use of its funds to thwart government actions.

b. Although the court of appeals suggested (App., *infra*, 22a n.16) that judicial review of government representation decisions will not greatly interfere with the government's exercise of discretion, the court's decision in this case shows that in fact it is prepared to engage in an intensive and exacting form of scrutiny. Here, the court did not consider the cumulative weight of the government's three reasons for denying representation but instead considered each reason in isolation. Moreover, the court found nothing improper about two of the reasons—the personal nature of respondent's dispute with Perry and respondent's violation of an EEOC rule in taping their conversation. However, the court concluded—apparently based on an extra-record review of the government's conduct of similar suits during the past decade—that the government had not always applied these criteria (*id.* at 23a-24a) and had afforded respondent disparate treatment (*id.* at 25a-26a). Finally, although the government's third reason for withholding representation—respondent's and Perry's overlapping suits against the EEOC—was entirely proper, the court assumed that the government was actually claim-

ing the right to deny repesentation as retaliation. The court's grudging construction and detailed disagreement with the government's reasons for its decision in this case suggest that future representation decisions will be intensively reviewed.

The court's review of the government's decision in this case is particularly disturbing because the public record bearing on that decision was unusually detailed, due to the long and public dispute between respondent and Perry. In other cases, the attorney-client, work product, and deliberative process privileges will frequently protect much of the information relating to the government's decision. In our judgment, if there is to be any judicial review under the APA of the government's representation decisions, the courts must take into account the sensitive and often privileged nature of much of the explanatory information. In any event, under no appropriate standard of review can the government's decision in this case be characterized as arbitrary or capricious.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JUNE 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1446

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. 81-01776)

Decided October 14, 1983

John D. Grad, with whom *Owen E. Perry* was on the brief, for appellant.

R. Lawrence Dessem, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, *Barbara L. Herwig*, Attorney, Department of Justice, and *Vella M. Fink*, Attorney, Equal Employment Opportunity Commission, were on the brief, for appellees. *Anthony J. Steinmeyer*, Attorney, Department of Justice, also entered an appearance for appellees.

Before ROBINSON, *Chief Judge*, WILKEY, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge:* This appeal is from the District Court's grant of summary judgment against plaintiff Evelyn Falkowski, a high-level career

employee of the Equal Employment Opportunity Commission (EEOC or Commission). In her complaint, Ms. Falkowski sought a judgment against the Commission and the Department of Justice (DOJ or Department) compelling them to reimburse her for past legal expenses and to provide future legal representation in two lawsuits brought against her by a subordinate during her tenure as director of EEOC's district office in Birmingham, Alabama. Plaintiff alleges that the defendant government agencies have denied her reimbursement and representation in these suits either for discriminatory and retaliatory motives in contravention of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. V 1981), or through arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

After Ms. Falkowski filed her complaint in District Court, the defendant government agencies moved in the alternative for dismissal or summary judgment. Although it found that the complaint stated valid causes of action under Title VII and the APA, the District Court nonetheless granted defendants' motion for summary judgment. *See Falkowski* v. *EEOC*, No. 81-1776 (D.D.C. Mar. 4, 1982). Plaintiff thereafter filed this appeal challenging the District Court's grant of summary judgment on three of her causes of action. We affirm the District Court's judgment as to plaintiff's first cause of action, but reverse as to the second and third because genuine issues of material fact relevant to those claims remain in the case.

I

The history of Ms. Falkowski's struggles with the EEOC stretches back to 1973 and encompasses an intervening volume of courtroom litigation and agency proceedings that for sheer sinuosity falls nothing short of Kafkaesque. Fortunately for purposes of the present opinion, we need recount only a portion of the various

judicial and administrative antecedents to the case now before us.

A. *The Background Litigation for Which Plaintiff Seeks Government Representation and Reimbursement*

Ms. Falkowski began her career with the EEOC in 1967 and by 1971 had become head of the Commission's newly formed office in Jackson, Mississippi. At the time, she was one of the few women professionals employed by EEOC in its southeastern region. After two years in the Jackson office, Ms. Falkowski sought a transfer to the Birmingham district office for both personal and professional reasons. When repeated attempts to procure her transfer failed, she brought suit against the EEOC alleging sexual discrimination as the motive for the agency's inaction. The matter was settled in apparently amicable fashion in the fall of 1974 when the Commission agreed to appoint Ms. Falkowski director of the Birmingham office. *See Falkowski* v. *Powell*, No. 73-P-1009-S (N.D. Ala. Sept. 9, 1974) (consent decree).

1. *The Perry v.* Golub *Litigation*

Following Ms. Falkowski's arrival in the Birmingham office, a series of disputes broke out between her and number of her subordinates, but principally with the office's deputy director, Bertram Perry. On his side, Mr. Perry alleged that the friction stemmed from his justified protests against mismanagement by Ms. Falkowski; in particular, he pointed to a series of procedural irregularities purportedly reflecting overzealousness and bias on her part in favor of plaintiffs in certain Title VII actions. *See Perry* v. *Golub*, 400 F. Supp. 409, 411-12 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). On her side, Ms. Falkowski contended that the conflict arose from her attempts to discipline rank

insubordination and oppressive behavior against office personnel by Mr. Perry. *See* Brief for Appellant at 8.[1]

As the conflict deepened, both parties began to seek support for their respective positions from superiors in the Atlanta regional office. A series of investigations ensued that resulted in EEOC's decision, first to suspend Ms. Falkowski's authority as district director, and then to transfer both parties out of the Birmingham office. Ms. Falkowski immediately presented a pleading in federal district court challenging her transfer as a violation of the 1974 consent decree.[2]

Mr. Perry likewise brought suit in federal district court to enjoin his own transfer out of Birmingham. His complaint named Ms. Falkowski and two other superiors, Messrs. Golub and Hollowell, as defendants. *See Perry* v. *Golub*, 400 F. Supp. 409 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). Alleging that the transfer violated his first amendment and other civil rights, Mr. Perry accused his EEOC superiors of attempting to silence his protests as a "whistleblower" and of discriminating against him on account of his race, which is black. These steps marked the beginning of the *Perry* v. *Golub* litigation, the first of the two suits for which plaintiff-appellant today seeks reim-

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[1] This court expresses no opinion on the merits of these contentions and notes that apparently no other court or agency has ever ruled definitively on them either. *See* Perry *v.* Falkowski, No. 78-PT-0935-S, slip op. at 2 (N.D. Ala. Apr. 17, 1981) (unpublished opinion granting plaintiff's motion for voluntary dismissal).

[2] Just prior to making this pleading, Ms. Falkowski had filed two administrative charges of employment discrimination against EEOC. In these charges, she alleged that the agency was undermining her authority in retaliation for her earlier suit against the Commission and because her predominantly black male superiors in Atlanta did not wish to see a white female in the Birmingham district-director post. *See* Appendix at 162-63 (reproducing charges of July 9, 1975, and August 15, 1975).

bursement and representation from the government in this court.

On August 29, 1975, the United States District Court for the Northern District of Alabama acted on Mr. Perry's complaint. A hearing was held in which EEOC attorneys appeared on behalf of all three defendants, including Ms. Falkowski, and in which private counsel for Ms. Falkowski was also present. At the hearing's conclusion, the district judge granted Mr. Perry's motion for a preliminary injunction barring his transfer from the Birmingham office. Under an informal agreement with the EEOC, Ms. Falkowski was allowed to "tag" along" on this injunction, thus suspending her transfer as well. As a result of this agreement, the district court agreed to take no action on Ms. Falkowski's separate pleading for relief under the earlier 1974 consent decree.[3]

The next relevant action in *Perry* v. *Golub* came in November 1976 when the district court granted Mr. Perry's motion to drop Ms. Falkowski as a defendant in the action. At roughly the same time, the court also acted to dissolve its preliminary injunction on grounds that efforts to remove Mr. Perry from his post were no longer afoot. Ms. Falkowski thereafter appealed her dismissal from the case, contending that EEOC attorneys had inadequately defended her in the 1975 preliminary-injunction hearing, and that she wished to remain in the action to clear her name. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dissolution of the injunction on grounds of

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[3] See Falkowski *v.* Perry, No. 76-G-0545-S, slip op. at 3 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983).

mootness,[4] and in an apparent nod to Ms. Falkowski vacated the underlying proceedings "so as to spawn no consequences." *Perry* v. *Golub*, 594 F.2d 862 (5th Cir. 1979) (No. 77-1719) (unpublished opinion).[5]

Numerous other controversies have emerged in the *Perry* v. *Golub* litigation since that time, including a dispute over the district court's retention of jurisdiction in the case after 1976[6] and a petition by Mr. Perry for costs and attorneys' fees.[7] Ms. Falkowski meanwhile had instituted parallel litigation of her own against EEOC superiors which has followed an equally labyrin-

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[4] The Fifth Circuit apparently mistook Ms. Falkowski's appeal of her dismissal from the case as an appeal of the district court's decision to dissolve the injunction. *See* Perry *v.* Golub, 25 Empl. Prac. Dec. (CCH) ¶ 31,488, at 18,936-38 (N.D. Ala. 1980) (noting on remand that the appellate court confused the issues before it on appeal), *vacated and remanded*, No. 81-7278 (11th Cir. Oct. 25, 1982). Once rendered, however, the Fifth Circuit's ruling became the law of the case. *See* Perry *v.* Golub, No. 81-7278, slip op. at 2-3 (11th Cir. Oct. 25, 1982) (Fifth Circuit precedent held case moot after May 1976 despite district court's opinion to the contrary and intervening transfer of appellate jurisdiction to the newly formed Eleventh Circuit).

[5] The court of appeals' "nod" was merely in recognition of the preliminary nature of the district court's factual findings and not in support of Ms. Falkowski's other allegations. At the 1975 preliminary-injunction hearing, the district court made numerous findings of fact suggesting improper conduct on Ms. Falkowski's part. *See* Perry *v.* Golub, 400 F. Supp. 409, 411-15 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). The Fifth Circuit evidently felt it unfair to leave these preliminary findings on the record absent the opportunity for a full hearing on the merits.

[6] Perry *v.* Golub, 464 F. Supp. 1016 (N.D. Ala. 1978), *vacated as moot*, 599 F.2d 1052 (5th Cir. 1979). *See also supra* note 4.

[7] *See* Perry *v.* Golub, 25 Empl. Prac. Dec. (CCH) ¶ 31,488 (N.D. Ala. 1980) (granting plaintiff's petition for costs and attorneys' fees), *aff'd in part and vacated and remanded in part*, No. 81-7278 (11th Cir. Oct. 25, 1982).

thine procedural course.[8] The details of these other proceedings, however, are not immediately relevant to the case before us.

2. *The* Perry *v.* Falkowski *Litigation*

During the pendency of the *Perry* v. *Golub* litigation, Ms. Falkowski and Mr. Perry remained together in the Birmingham office on terms that few would describe as cordial. In an attempt to gather evidence corroborating her charges of continuing insubordination by Mr. Perry, Ms. Falkowski secretly recorded a confrontation with him that occurred in her office on July 18, 1977. Besides insubordination, the recording revealed a regrettable stream of obscenities and racial epithets on Mr. Perry's part. *See* Appendix at 11-19 (transcript of tape recording). What Ms. Falkowski's conduct might have been in the absence of a recording device known only to himself, one can only conjecture. The incident served to underscore, however, the depths to which professional relationships and behavior had sunk in the Birmingham office by mid-1977.

On the basis of the tape-recording incident, the EEOC moved to terminate both Mr. Perry and Ms. Falkowski from its employ. The Commission justified its action in Mr. Perry's case on the basis of the tape's content. In Ms. Falkowski's case, the Commission found that she had violated an internal agency order prohibiting nonconsensual recording of official conver-

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[8] *See, e.g.*, Falkowski *v.* Perry, No. 76-G-0545-S (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' *fees*), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983); Falkowski *v.* Perry, 464 F. Supp. 1016 (N.D. Ala. 1978), *vacated as moot*, 599 F.2d 1051 (5th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

sations by agency personnel. *See Perry* v. *Golub*, 464 F. Supp. at 1019 & n.2 (citing EEOC Order No. 165).[9]

Provoked by Ms. Falkowski's ruse and disturbed by the resulting personel action. Mr. Perry filed suit in 1978 in federal district court against Ms. Falkowski and EEOC chairwoman Eleanor Norton. The complaint sought a declaratory judgment that Mr. Perry's constitutional and statutory rights had been violated, and prayed for compensatory and punitive damages totalling over five million dollars. This step commenced the *Perry* v. *Falkowski* litigation, the second suit for which plaintiff-appellant today seeks reimbursement and representation from the government in this Court.

Action on Mr. Perry's complaint was delayed until 1981, when the district court granted his request for voluntary dismissal. *See Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D. Ala. Apr. 17, 1981) (unpublished opinion). At the same time, Ms. Falkowski moved for leave to file counterclaims for defamation and other charges against Mr. Perry, but the district court denied her motion. *Id.* Ms. Falkowski then filed a petition for costs and attorneys' fees as a prevailing defendant against Mr. Perry. The district court denied this petition as well, and the Eleventh Circuit affirmed the decision on appeal. Ms. Falkowski's petition for certiorari on this last issue has recently been denied by the United States Supreme Court. *See Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D. Ala. July 22, 1981) (unpublished opinion denying defendant's petition for costs and attorneys fees), *aff'd*, No. 81-7643 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983).

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[9] Although EEOC later abandoned its efforts to discharge Ms. Falkowski and Mr. Perry, it did succeed in having them permanently transferred out of the Birmingham office.

B. *Plaintiff's Efforts to Secure Government Representation and Reimbursement*

Of greater relevance to the present appeal have been Ms. Falkowski's earlier, unsuccessful attempts to secure representation by government counsel, or, in the alternative, reimbursement for her expenses in hiring private counsel, in the *Perry* v. *Golub* and *Perry* v. *Falkowski* litigations. Since late 1976, EEOC attorneys have apparently never undertaken to represent Ms. Falkowski in any of the proceedings in either case, even though government counsel has been provided to each of her codefendants. To date, Ms. Falkowski has amassed substantial legal bills conducting her own defense with private attorneys in these cases.

1. *Plaintiff's Efforts to Secure Representation and Reimbursement in* Perry *v.* Golub

Prior to the filing of Mr. Perry's complaint in *Perry* v. *Golub* in late August 1975, Ms. Falkowski had already filed two charges of employment discrimination against EEOC and her immediate supervisors in Atlanta. *See* Appendix at 162-63 (reproducing charges of July 9, 1975, and August 15, 1975). These charges alleged that the agency and her superiors were undermining her authority by granting preferential treatment to a black male subordinate (presumably Mr. Perry) and by failing to support her in efforts to control insubordination on his part. The charges recited sex and race discrimination, as well as retaliation for her earlier 1973 suit, as the motives for the agency's conduct.

On December 12, 1976, over eighteen months later, Ms. Falkowski filed an amendment to these earlier charges with the then acting chairwoman of EEOC, Ethel Walsh. *See* Appendix at 168-69 (Memorandum from Evelyn Falkowski to Ethel Walsh (Decmeber 12, 1976)). Although nowhere in her statement did Ms.

Falkowski request representation or reimbursement from the agency, she did in somewhat oblique terms challenge the quality of her representation by EEOC attorneys in the *Perry* v. *Golub* litigation. The amendment alleged, for example, that she had been "prejudiced before a Federal District judge," apparently by agency counsel's failure to rebut unsubstantiated charges and perjured testimony introduced against her (again, presumably by Mr. Perry) in the case. *Id.*

Without entering into excruciating detail on this point, suffice it to say that at every turn in the ensuing administrative complaint and appeals process, arising out of not only these incidents but others as well, Ms. Falkowski continued to assert that EEOC for discriminatory and retaliatory reasons had failed to provide her with an adequate defense in the *Perry* v. *Golub* litigation. *See, e.g.*, Appendix at 178-79, 184-85, 189-90, 197, 202, 205, 281. Although in the context of these administrative proceedings she never raised a specific claim for representation or reimbursement linked to her charges of inadequate defense, we are willing to assume for purposes of the present appeal that the goal of her complaints was to secure agency legal assistance in clearing her name, promotions and retroactive raises denied her because of damage to her reputation, and finally some form of restitution for the legal expenses she incurred in carrying on her own defense with private counsel.

2. *Plaintiff's Efforts to Secure Representation and Reimbursement in* Perry *v.* Falkowski

Ms. Falkowski's efforts to secure government legal representation and reimbursement have been more explicit in the case of the *Perry* v. *Falkowski* litigation. Mr. Perry filed his initial complaint in that case on August 24, 1978. His suit was against Ms. Falkowski for secretly taping his outburst one year before and against EEOC chairwoman Norton for attempting to discharge

him based on the tape's content. *See* Appendix at 108-10 (reproducing Mr. Perry's complaint). Although EEOC attorneys defended Ms. Norton in that action, they provided no defense for Ms. Falkowski at all.

After learning that EEOC attorneys would not defend her, Ms. Falkowski immediately requested that the Commission secure Department of Justice representation for her. What ensued was an episode of bureaucratic red tape and temporizing that did not end until May of the following year when DOJ finally denied Ms. Falkowski's request. *See* Appendix at 101-03 (declaration of John Seibert, Assistant Director of Federal Programs Branch, DOJ Civil Division).

Frustrated by the delay with which her request was being processed, Ms. Falkowski consulted with an EEO counselor at the Commission on November 20, 1978, and filed a corresponding administrative complaint one month later on December 19th. *See* Appendix at 189-90, 24, 281. In her interview and complaint, she charged that EEOC was continuing to discriminate and retaliate against her by, in effect, denying her legal defense in the *Perry* v. *Falkowski* suit. She demanded that appropriate representation be provided immediately. The counselor's report quoted EEOC legal counsel as saying that the Commission could not provide legal defense for Ms. Falkowski and that the matter had been forwarded to the Department of Justice for handling. *Id.* at 190 (Counselor's Survey of December 6, 1978).[10]

The reasons for the delay in processing Ms. Falkowski's request for counsel appear to have been multiple. First, no one informed her that she had to submit her

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[10] The EEOC took final action on Ms. Falkowski's administrative complaint two years later, when it cancelled the complaint based on the District Court's decision in the case presently before us. *See* Appendix at 281-82 (Letter from Gilbert Sandate to Evelyn Falkowski (March 24, 1982)).

petition directly to the Department of Justice rather than to her immediate employing agency, EEOC. Second, despite repeated requests from DOJ, EEOC failed to certify in writing that Ms. Falkowski had been acting within the scope of her official duties when she recorded her conversation with Mr. Perry the year before. That certification did not come until December 20, 1978. Finally, between that date and May of the following year, the Department of Justice simply failed to act on Ms. Falkowski's request. By that point, of course, the request had been transformed from one for representation only into one for representation and reimbursement, since the deadline for filing an answer to the *Perry* v. *Falkowski* complaint had already long since passed and Ms. Falkowski had had no choice but to utilize private counsel of her own.

Finally, on May 17, 1979, Assistant Attorney General Barbara Babcock wrote to EEOC and Ms. Falkowski to deny the request for representation and reimbursement in connection with the *Perry* v. *Falkowski* suit. Her letter gave the reason for the Department's action as follows:

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of the United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15 (a)(2), I am denying Ms. Falkowski's request.

Appendix at 116. Following this denial, Ms. Falkowski asked the Department several times to reconsider its action, but each time DOJ acted to reaffirm its earlier decision.

II

Following these twists and turns in the federal courts of Alabama and Georgia and before the various administrative agencies here in Washington, Ms. Falkowski finally filed suit against EEOC and DOJ in United States District Court for the District of Columbia. In her complaint, she alleged three statutory causes of action: (1) one against EEOC under Title VII for discriminatory and retaliatory denial of adequate government legal representation in *Perry* v. *Golub*, (2) another against EEOC under Title VII for its actions in the *Perry* v. *Falkowski* litigation, and (3) a final cause of action under the APA against the Department of Justice for arbitrary and capricious denial of government legal representation in *Perry* v. *Falkowski*.[11] *See* Brief for Appellant at 15-16; *infra* note 12.

Before filing an answer, the defendant government agencies moved in the alternative for dismissal or summary judgment. The District Court, in an unpublished opinion, granted the defendants' motion for summary judgment on all three statutory claims.[12]

As to the first cause of action, the District Court ruled that EEOC attorneys had actually represented Ms. Falkowski in the *Perry* v. *Golub* litigation, and

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[11] The Administrative Procedure Act, of course, does not confer independent subject matter jurisdiction on federal district courts to review federal agency action. Califano *v.* Sanders, 430 U.S. 99, 105 (1977). Rather, such jurisdiction is based on general federal question jurisdiction under 28 U.S.C. § 1331 (Supp. V 1981). The APA merely provides the appropriate scope of review, once jurisdiction is otherwise available.

[12] Ms. Falkowski also alleged several constitutional causes of action under the first and fifth amendments which the District Court dismissed outright. *See* Falkowski *v.* EEOC, No. 81-1776, slip op. at 1-2 (D.D.C. Mar. 4, 1982). Plaintiff, however, has chosen not to appeal the dismissal of these claims. *See* Brief for Appellant at 15-16.

that she therefore had no claim against the Commission for denial of legal counsel in that case. *See Falkowski* v. *EEOC*, No. 81-1776, slip op. at 1 n.1 (D.D.C. Mar. 4, 1982). In the alternative, the District Court held that, even if Ms. Falkowski did have such a claim, it was time-barred by her failure to file a formal administrative complaint with the EEOC within thirty days after the claim arose. *Id.* (citing 29 C.F.R. § 1613.214(a)(1)(i) (1980)).

On Ms. Falkowski's second cause of action, the District Court noted that EEOC lacks authority to appoint or reimburse private legal counsel to defend agency personnel, and that the Commission's power is therefore limited to recommending such action to the Department of Justice. *Id.* at 2 (citing 28 U.S.C. § 517 (1976) and 28 C.F.R. §§ 50.15-50.16 (1980)). Because EEOC did recommend that DOJ reimburse Ms. Falkowski for her private legal expenses in *Perry* v. *Falkowski*, the District Court held that she had no claim against the Commission under Title VII for denial of legal counsel in that case either. Although Ms. Falkowski contended that the EEOC recommendations had been pretextual, the District Court noted that she had presented "no admissible evidence" to support this point, and had therefore failed to establish a prima facie case. *Id.*

Finally, as to the third cause of action, the District Court concluded that the Department of Justice had not acted arbitrarily or capriciously in denying Ms. Falkowski's request for government representation and reimbursement in *Perry* v. *Falkowski*. The court noted that the DOJ had considered Ms. Falkowski's request under the applicable statutes and regulations,[13] and had prop-

[13] The Attorney General has promulgated regulations governing the representation of federal employees by government-provided legal counsel in certain proceedings in which those employees are sued or subpoenaed in their individual capacity. *See*

erly denied it as not "in the interest of the United States" in accordance with 28 C.F.R. § 50.15(a)(2) (1979). As evidence that the Department's conclusion on this issue had not been arbitrary or capricious, the

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28 C.F.R. §§ 50.15-50.16 (1982). Statutory authority for the regulations is claimed under 28 U.S.C. §§ 516-517 (1976) (reserving conduct of litigation involving federal officers to the Attorney General and permitting him to send officers of the Department of Justice into court to attend to the interests of the United States).

In general, the regulations provide that federal employees may be provided legal representation at government expense if such representation is in the interests of the United States and the conduct for which the employee seeks representation was committed within the scope of his employment. *See* 28 C.F.R. § 50.15 (a) (1982). Unless it feels that representation is clearly unwarranted, the officer's employing agency is required to report to the Department of Justice whether the employee was acting within the scope of his employment, and whether the agency recommends representation in his case. *Id.* § 50.15 (a)(1). Under certain circumstances in which representation by DOJ attorneys would be ethically inappropriate, private counsel may be provided to the employee at government expense. *Id.* §§50.15 (a)(9)-(10), 50.16.

The Department takes the position that it will always provide representation for federal employees sued solely in their official capacity for equitable relief. *Id.* § 50.15(a)(1). *See also* United States Attorneys' Manual § 4-13.000 (1977). Employees sued in their individual capacity for money damages, however, must request representation through the procedures outlined above. So also, it appears, must employees who fall in between these two polar categories, e.g., employees sued in both their official and individual capacities for money damages and equitable relief. Ms. Falkowski fell into this latter intermediate category as a defendant in the *Perry* v. *Falkowski* suit.

The Attorney General's regulations were first published in the *Federal Register* on January 19, 1977, *see* Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977), and later codified in the *Code of Federal Regulations*, *see* 28 C.F.R. §§ 50.15-50.16 (1977). Despite subsequent clarifying amendments, *see* 47 Fed. Reg. 8172 (1982), the regulations remain in substantially their original form.

District Court cited the three reasons spelled out in Assistant Attorney General Babcock's letter of May 17, 1979, quoted earlier in this opinion. *Falkowski* v. *EEOC*, slip op. at 2-3.

III

The issue before us on this appeal is whether the District Court moved too quickly in granting summary judgment because genuine issues of material fact remain in the case. Rule 56(c) of the Federal Rules of Civil Procedure governs this issue and provides that summary judgment shall issue only when the pleadings and other materials before the court establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Accordingly, summary judgment is inappropriate unless the moving party can establish that the evidence presented by the parties unequivocally resolves all relevant factual and legal issues in its own favor, and that this is so even though the evidence is viewed in the light most favorable to the party opposing the motion.

Because the defendant government agencies failed to meet this burden with respect to plaintiff's second and third causes of action, we hold that the District Court erred in granting summary judgment on those claims. In all other respects, we uphold the District Court's judgment, but modify certain of the grounds on which it based its ruling.

A. *Plaintiff's First Cause of Action*

The District Court ruled that Ms. Falkowski had no cause of action under Title VII against EEOC for denial of legal expenses in *Perry* v. *Golub* because EEOC attorneys had actually represented her in that case. *Falkowski* v. *EEOC*, slip op. at 1 n.1. In the alternative, the District Court held that, even if she did have such a claim, she had lost it by failing to file a formal adminis-

trative complaint with the Commission within thirty days after the claim arose. *Id.* Pretermitting the issue of whether Ms. Falkowski preserved her claim through timely administrative filing, we uphold the District Court on the first of the two grounds proposed.

In response to the District Court's ruling that EEOC attorneys actually represented her in the *Perry* v. *Golub* litigation, plaintiff argues that her claim goes, not to the fact of representation *vel non*, but to the adequacy of the representation that EEOC did provide. *See* Brief for Appellant at 23-27. Although we might otherwise be inclined to find merit in this position,[14] we hold that plaintiff is collaterally estopped from challenging the adequacy of her representation by EEOC attorneys in the *Perry* v. *Golub* suit.

In August 1980, Ms. Falkowski filed a petition for costs and attorneys' fees as a prevailing plaintiff in

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[14] It seems fairly clear that EEOC attorneys could not have provided Ms. Falkowski an adequate defense in *Perry* v. *Golub* because of the irreconcilable conflict of interest that existed between the agency and Ms. Falkowski in that case. On the very same day that EEOC superiors appeared as co-defendants with Ms. Falkowski in the *Perry* v. *Golub* preliminary-injunction hearing, she was bringing a motion against them and the agency in the same courthouse seeking to have her own transfer set aside as violative of the consent decree entered in her prior lawsuit against the agency. As adverse parties in related litigation arising out of the same underlying dispute, the Commission (in the persons of her superiors) and Ms. Falkowski could not be adequately represented by the same counsel as a matter of law, and it was highly improper for EEOC attorneys to undertake such dual representation. *See* United States Fidelity & Guar. Co. *v.* Louis A. Roser Co., 585 F.2d 932, 938-39 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105 (1981).

These are arguments, however, that Ms. Falkowski should have presented in the Northern District of Alabama and the Eleventh Circuit, not in this court. *See infra* text following this note (discussing issue of collateral estoppel).

Falkowski v. *Perry*, her own action against EEOC superiors briefly discussed earlier in this opinion. *See supra* note 8 and accompanying text. In her petition, she requested costs and attorneys' fees against the Commission arising, not only out of that action, but also out of her defense of the *Perry* v. *Golub* suit. This somewhat unusual request was based on the theory that Ms. Falkowski and EEOC had been adverse co-defendants in the *Perry* v. *Golub* litigation, and that to the extent that EEOC had abandoned its attempts to transfer her involuntarily, she had prevailed over the agency.

To support the conclusion that EEOC had been an adverse co-defendant in *Perry* v. *Golub*, Ms. Falkowski pointed to the defense that EEOC attorneys had provided her in that action, and contended that that defense had been not only inadequate but a sham. *See Falkowski* v. *Perry*, No. 76-G-0545-S, slip op. at 15 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983). In denying this portion of Ms. Falkowski's petition, the United States District Court for the Northern District of Alabama flatly rejected this line of argument, finding it "not substantiated by the facts." *Id.* at 16. *See also id.* at 18-19.

Under established principles of collateral estoppel, Ms. Falkowski is not now free to relitigate these same issues before this court. Even were we to disagree with the specific findings made by the district court in Alabama, plaintiff's remedy is not to be found in this forum but through direct appeal of the judgment of which those findings form an integral part.

Given that Ms. Falkowski is collaterally estopped from asserting a key element of her first cause of ac-

tion, the District Court's grant of summary judgment against her on that claim is accordingly affirmed.

B. *Plaintiff's Second Cause of Action*

Ms. Falkowski's second cause of action charged EEOC with discrimination and retaliation under Title VII arising out of the agency's handling of her request for government-provided legal counsel in *Perry* v. *Falkowski*. The District Court granted summary judgment on this claim because, to paraphrase the court's opinion, EEOC did all it could for Ms. Falkowski when it recommended that DOJ retain private legal counsel to represent her in the case. *Falkowski* v. *EEOC*, slip op. at 2. Although we agree with the District Court that EEOC lacks statutory authority to retain private counsel itself to defend agency officers in court,[15] the bare fact of for-

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[15] Section 516 of Title 28 provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (1976). Although EEOC is authorized by law to send its own attorneys into court to represent the Commission, only EEOC attorneys appointed to regular federal service may act in this capacity. *See* 42 U.S.C. § 2000e-4(a), (b)(2) (1976 & Supp. V 1981). Accordingly, EEOC lacks statutory authority to hire private counsel to appear in court for any reason, not merely in cases involving agency officers as defendants.

Commission attorneys could not themselves represent Ms. Falkowski in the *Perry* v. *Falkowski* litigation because of actual conflicts of interest that existed between her and the agency throughout this period. At the time of the *Perry* v. *Falkowski* suit, Ms. Falkowski had already gone into court to challenge her own proposed discharge by the agency based on the same 1977 tape-recording incident that had given rise to Mr. Perry's lawsuit. *See* Falkowski *v.* Perry, No. 76-G-0545-S, slip op. at 3-6 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983). The agency therefore had

mal Commission recommendation was not sufficient to support defendants' motion for summary judgment on this claim.

The relevant factual inquiry instead should have been whether EEOC acting out of discriminatory animus intentionally mishandled Ms. Falkowski's request so as to undercut the force of its formal recommendation on paper. This test admittedly places a heavy burden on plaintiff to show not only that the Commission acted out of legally proscribed motives, but also that its mishandling actually resulted in DOJ's final decision to deny her representation.

Viewing the evidence in the light most favorable to plaintiff, however, we are satisfied that the record reveals triable issues of fact on both of these points. The government does not contest, for example, that EEOC delayed for over three months in certifying that Ms. Falkowski had acted within the scope of her employment despite numerous requests for such certification from the Department of Justice. Although we express no opinion on the final resolution of this issue, it is certainly a reasonable inference that EEOC was wilfully dragging its feet because it did not wish government representation to be approved at all, or at least not in time to meet the Perry complaint. Moreover, a reasonable person might conclude that, once this lack of enthusiasm on the part of Ms. Falkowski's employing agency had been communicated to the Department of Justice, DOJ was unlikely to act favorably on her request for government-provided legal counsel.

Because the government failed to dispel these obvious inferences of illegal motivation and resulting harm

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interests adverse to Ms. Falkowski's in related litigation arising out of the same underlying dispute, and EEOC attorneys were ethically bound not to represent her in the *Perry* v. *Falkowski* suit. *See* United States Fidelity & Guar. Co. *v.* Louis A. Roser Co., 585 F.2d 932, 938-39 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105 (1981).

that arise from the Commission's dilatory handling of Ms. Falkowski's request, we conclude that genuine issues of material fact remain with respect to her second cause of action. The District Court's grant of summary judgment on this claim is therefore reversed.

C. *Plaintiff's Third Cause of Action*

In her third cause of action, Ms. Falkowski cited the Department of Justice for arbitrary and capricious agency action in denying her request for government-provided legal counsel in *Perry* v. *Falkowski*. The District Court granted summary judgment on this claim because it found that the Department had not acted in contravention of the APA in turning down her request. *Falkowski* v. *EEOC*, slip op. at 2-3. We find, however, that the reasons for denial articulated by the Department are facially insufficient to establish the reasonableness of its decision. Moreover, the evidence suggests that DOJ may have accorded Ms. Falkowski disparate treatment under its existing regulations and practice. The rationality of the Department's decision therefore cannot be determined without further factual inquiry, and we accordingly hold that summary judgment as to this final cause of action was inappropriate.[16]

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[16] As an alternative ground for supporting the District Court's grant of summary judgment on this claim, the Department of Justice urges that its decision is unreviewable under the APA as action "committed to agency discretion" under 5 U.S.C. § 701(a)(2) (1976). *See* Brief for Defendants-Appellees at 31-38. In support of its position, the Department sets forth a detailed analysis following the three-factor test spelled out by this Court in Natural Resources Defense Council, Inc. *v.* SEC, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979). We have considered the government's arguments on this point and find them unpersuasive.

Under the first factor of the *Natural Resources* test, the Department relies particularly on the nonmandatory language of its own regulations to conclude that plaintiff has no legally protectable interests to be safeguarded through judicial oversight. *See* Brief for Defendants-Appellees at 33 (*"The Department of Justice Policy Statement ... merely provides that*

1. *The Babcock Letter*

In concluding that the Department of Justice did not act arbitrarily or capriciously in denying Ms. Falkowski's request for government counsel, the District

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'[r]epresentation by private counsel at federal expense *may* be provided to a federal employee' if certain preconditions have been met.") (quoting 28 C.F.R. § 50.16 (a) (1979) (emphasis added)). Yet the federal courts have long held discretionary denials of relief or assistance to be reviewable under the APA. *See, e.g.*, Rassano *v.* INS, 492 F.2d 220, 227 (7th Cir. 1974) (language in 8 U.S.C. § 1254 (1970) stating that "the Attorney General may, in his discretion, suspend deportation" does not bar review under the APA). The policy reasons supporting reviewability in such cases are clear. Although an aggrieved individual may have no "right" to the relief provided by the agency, he is entitled to an agency decision on his request that is at least rational and free from abuse of discretion.

Under the second factor of the *Natural Resources* test, DOJ argues that the burden of defending denial-of-representation decisions in court will divert scarce institutional resources from its congressionally assigned mission of defending other federal employees in court. Because judicial review inherently involves some costs of litigation, this fact alone cannot decide the issue of reviewability. Rather, the logic of the *Natural Resources* test rests on a pragmatic weighing of all three factors against the strong presumption of judicial review created by the APA. *See* 606 F.2d at 1043-44. Given the Department's broad latitude to determine when litigation on behalf of government defendants is in the interests of the United States, most challenges to its discretion can be handled at the dismissal or summary judgment stage. We do not believe that this reduced burden militates against the APA's presumption of reviewability.

Under the third factor, the Department points to the myriad issues bearing upon representation decisions and concludes that such determinations are inappropriate subjects for judicial review. This court appreciates the numerous legal, policy, and fiscal factors that impinge upon the Department's decisions in this area. Yet judicial review does not call for courts to substitute their own judgment for that of the agency. On the contrary, the reviewing court's scrutiny of substantive agency decisions is in most cases limited to determining whether the reasons articulated by the agency make sense. While this court has a modest appreciation for the limits of its abilities, we do not feel that such a task is beyond our powers.

Court relied heavily on the three reasons set forth in Assistant Attorney General Babcock's letter of May 17, 1977. Each of those reasons purported to show why reimbursing Ms. Falkowski for her legal expenses would not be "in the interest of the United States" as mandated by 28 C.F.R. § 50.15 (a)(2) (1979). We conclude that the various rationales proposed by the Assistant Attorney General are insufficient on their face to support the government's motion for summary judgment on the issue of reasonableness under section 706(2)(A) of the APA.

The first reason cited in the Babcock letter for denying Ms. Falkowski's request was "the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry." This does not seem a rational reason for the conclusion based upon it. Indeed, most Title VII suits concerning individual incidents of discrimination or retaliation involve disputes intensely personal in nature. Why this happenstance justifies denying government legal representation to a federal officer sued by her immediate subordinate is not immediately apparent to this court. In fact, it would appear that government counsel represent federal officials as defendants in quite acrimonious Title VII actions on a regular basis. *See, e.g., Carson* v. *Bolger*, 510 F. Supp. 106 (E.D. Mo. 1981).

The second reason given by the Assistant Attorney General was "the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive." This rationale, as well, does not withstand scrutiny standing on its own. The departmental regulations cited in the Assistant Attorney General's letter provide for hiring private legal counsel at government expense to defend federal officials sued in their individual capacities, *even though those officials are simultaneously under federal criminal investigation for the same acts for which representation is provided. See* 28 C.F.R. § 50.15 (a)(5) (1979). Indeed, in a

1977 letter to United States District Judge Gerhard Gesell, the Assistant Attorney General noted that DOJ had retained private counsel to defend numerous federal officials then under criminal investigation by the Department of Justice. *See* Letter from Assistant Attorney General Babcock to District Judge Gesell (May 1977), *reprinted in* STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95TH CONG., 2d SESS., REPORT ON JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS 150-55 (Comm. Print 1978). It is not clear why the alleged violation of an internal agency directive disqualifies a federal officer for government-provided legal representation and suspected criminal activity does not.

The third reason given for turning down Ms. Falkowski's request was "the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them." This rationale is, if anything, the least satisfactory of all. On its face, it appears retaliatory and, as such, an impermissible basis for agency action.[17] Federal officers cannot become ineligible for government-provided legal defense in individual-capacity suits merely because they have challenged earlier personnel actions against them. To conclude otherwise would impose an impermissible burden on the rights granted federal workers by Congress and the Constitution, in this case under Title VII of the

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[17] The government in its brief asserts that the Assistant Attorney General's reference to the Perry and Falkowski litigation merely illustrates the extent of the personal feud between them. *See* Brief for Defendants-Appellees at 30 n.* The problem with this interpretation is that Ms. Falkowski's suit was not against Bertram Perry, but against the EEOC and her administrative supervisors, including one Lowell Perry, former chairman of the EEOC. *See* Appendix at 74 n.5.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. V. 1981).

2. *Disparate Treatment*

At the time DOJ rendered its decision against Ms. Falkowski, cases in which federal defendants had been denied government-provided legal counsel were apparently few and far between. During 1977 and 1978, both houses of Congress conducted hearings into Department of Justice practice and policy regarding retention of private legal counsel to defend government officials in civil lawsuits. These investigations were prompted by the Department's escalating expenditures for private legal counsel in individual-capacity suits that had burgeoned following the Senate Watergate and Intelligence Committee hearings. *See* STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, *supra*, at ix-xiv, 1.

A Senate committee staff report prepared following the 1977-78 hearings reviewed DOJ practice and policy in this area and concluded,

> Apparently, the Department's position is that it is in the public interest to defend any conduct which has not been held to be criminal.... The practical result is that, "however gross that conduct may seem to the layman," the Department has *not once* found the public interest to be independent grounds for refusing to represent an employee sued in his or her individual capacity when the Department has determined such employee was acting within the scope of his or her employment.

Id. at 6 (emphasis added).[18]

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[18] The committee staff's conclusion parallels the position expressed by the Attorney General in the explanatory materials accompanying the initial promulgation of DOJ regulations in

This finding hardly comports with the position taken by the Department in denying Ms. Falkowski's request for counsel, and raises a strong inference that her request was accorded disparate treatment in comparison to other applications recently processed by the Department. Because DOJ failed to explain this apparent incongruity in its treatment of similarly situated applicants, the District Court should have withheld final judgment on Ms. Falkowski's claim pending fuller development of the facts. *Cf. Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (ICC order remanded for failure to explain agency's disparate treatment of similarly situated applicants).

After reviewing the reasons articulated in Assistant Attorney General Babcock's letter and considering the apparent contemporaneous practice of the Department of Justice, we conclude that the rationality of the Department's decision in Ms. Falkowski's case cannot be established absent further factual exploration. The District Court's grant of summary judgment on plaintiff's final claim was therefore inappropriate, and we accordingly reverse.[19]

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this area in January 1977. *See* Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977) (Supplementary Information). For a discussion of these regulations, see *supra* note 13.

[19] As an alternative ground for upholding the District Court's grant of summary judgment on all three statutory claims, the defendant government agencies argue that the relief plaintiff seeks is in essence money damages, and that neither the APA nor Title VII provides for such damages against the United States, *See* Brief for Defendants-Appellees at 38-43 (citing 5 U.S.C. § 702 (1976) and 42 U.S.C. § 2000e-5(g) (1976)). They therefore contend that plaintiff's suit is barred by the doctrine of sovereign immunity.

We do not find it necessary to characterize the attorneys' fees plaintiff seeks as money damages or some other form of relief.

IV

On the basis of the filings and other documents before the District Court, summary judgment was properly granted with respect to plaintiff's first cause of action claiming reimbursement for her legal expenses in the *Perry* v. *Golub* case. As to her remaining two causes of action seeking representation and reimbursement in the *Perry* v. *Falkowski* litigation, we find that genuine issues of material fact remain in the case precluding summary judgment at this juncture. We therefore remand these two claims to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

Should plaintiff prevail at the liability stage under Title VII and the APA, the most appropriate remedy would not appear to be an order compelling agency reimbursement of the withheld payment, but a remand to the Department of Justice to reconsider plaintiff's request free of any biased input from EEOC and on the basis of rational decisionmaking criteria. Such relief is clearly equitable in nature and not money damages.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1776

EVELYN FALKOWSKI, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 4, 1982]

MEMORANDUM

Evelyn Falkowski brings this action against the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), arising out of their refusal to provide her with legal representation and reimbursement of legal fees for suits brought against her by a subordinate.[1] The defendants have

[1] Mrs. Falkowski's complaint requests that the United States be compelled "to pay her legal fees and provide her with legal defense in connection with two actions in which she was sued..." Mrs. Falkowski was first sued in 1975 in *Perry* v. *Golub*, No. 75-G-1476-S (N.D.Ala.) Not only does she admit tht EEOC attorneys represented her in that action, but the fact has been noted in two separate judicial opinions. *See Perry* v. *Golub*, 74 F.R.D. 360, 369 (N.D.Ala. 1976); *Falkowski* v. *Perry*, No. 76-G-0545-S, slip. op. at 16 (N.D.Ala. Feb. 17, 1981). Nevertheless, plaintiff claims she has been damaged by EEOC's failure to provide her with an adequate representation and defense in that action. To the extent that Mrs. Falkowski is attempting to state a cause of action under Title VII with regard to that suit, the action is time-barred because she did not properly pursue her administrative remedies by filing a formal complaint with the EEOC within 30 days, *see* 29 C.F.R.

moved to dismiss, or in the alternative, for summary judgment. Mrs. Falkowski has opposed the defendants' motion and has also moved to amend her complaint.[2]

Although it recites several statutory and constitutional bases for jurisdiction, Mrs. Falkowski's complaint states causes of action only under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1976 & Supp. III 1979) (Title VII), and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1976 & Supp. III 1979) (APA). Because "the EEOC and the Department of Justice regularly and routinely defend federal employees who are acting within the scope of their employment in connection with lawsuits brought against said employees in connection with their employment," Mrs. Falkowski claims that "the failure of the EEOC to provide legal representation for plaintiff is . . . a result of discrimination." However, only DOJ may authorize legal representation or reimbursement of fees. *See* 28 U.S.C. § 517 (1976); 28 C.F.R. §§ 50.15, .16 (1980). The role of the EEOC is limited to recommending to the DOJ that representation be authorized and certifying that the employee in question was acting within the scope of his or her employment. 28 C.F.R. § 50.15(a)(1). Documents as well as an affidavit filed on behalf of the Government establish that the EEOC did recommend that representation be authorized and certified that Mrs. Falkowski was acting within the scope of her employment. Mrs. Falkowski presents no admissible evidence directly to the contrary and has failed to

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§ 1613.214(a)(1)(i) (1980). *E.g.*, *Milton* v. *Brown*, 471 F. Supp. 150, 152-53 (D.D.C. 1979), *modified on other grounds*, 645 F.2d 1070, 1074-77 (1981).

[2] Mrs. Falkowski's motion for leave to amend her complaint seeks to add the names of J. Clay Smith, Acting Chairman of the EEOC, and William French Smith, Attorney General of the United States, as additional defendants.

establish a prima facie case. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973).

The claim under the APA alleges that "the refusal of the EEOC and DOJ to provide plaintiff defense in these actions is arbitrary and capricious and a violation of their duty under law." As noted, the EEOC is without power to authorize legal defense and fully fulfilled its duty by providing DOJ with the required information. The issue of whether the DOJ's decision not to represent or reimburse Mrs. Falkowski is subject to judicial review need not be decided here. It is clear that the DOJ's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," so as to be in violation of the APA. 5 U.S.C. § 706(2)(A). In accordance with the applicable statute and regulation, the DOJ decided that it was not "in the interest of the United States" to provide legaal representation or reimbursement to Mrs. Falkowski. *See* 28 C.F.R. § 50.15(a)(2). *See also* 28 U.S.C. §§ 516-17. The reasons for this decision are set forth in then-Assistant Attorney General Barbara Allen Babcock's letter of May 17, 1979, to Mrs. Falkowski's private counsel:

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of tthe United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15(a)(2), I am denying Ms. Falkowski's request.

In view of the foregoing, defendants' motion for summary judgment is granted. Since the proposed amendment of Mrs. Falkowski's complaint would have no effect on the foregoing determination, that motion is denied.

An appropriate order follows.

/s/ John Lewis Smith, Jr.

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1776

EVELYN FALKOWSKI, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 4, 1983

ORDER

Upon consideraton of defendant's motion for dismissal or, in the alternative, for summary judgment, plaintiff's opposition, plaintiff's motion for leave to amend the complaint, defendants' reply to plaintiff's opposition, plaintiff's surrebuttal, the arguments of counsel and the entire record, it is by the Court this 3rd day of March 1982

ORDERED that defendants' motion for summary judgment is granted, and it is further

ORDERED that plaintiff's motion to amend the complaint is denied.

/s/ _____
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

Civil Action No. 81-01776

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

[Filed Jan. 12, 1984]

BEFORE: ROBINSON, *Chief Judge;* WILKEY, *Circuit Judge* and MCGOWAN, *Senior Circuit Judge*

ORDER

On consideration of the Petition for Rehearing of Appellees, filed November 28, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court:

GEORGE A. FISHER,
Clerk

By: Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1983

No. 82-1446

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

[Filed Jan. 12, 1984]

BEFORE: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

Appellee's Suggestion for Rehearing *en banc*, filed November 28, 1983, has been circulated to the full Court. A majority of the judges in regular active service has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion is denied.

Per Curiam

For The Court:

GEORGE A. FISHER, *Clerk*

By: Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Scalia and Starr would grant the suggestion.

A statement by Circuit Judge Starr, joined in by Circuit Judge Scalia, is attached.

No. 82-1446

EVELYN FALKOWSKI

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

In the case before us, a panel of this court has concluded that judicial review under the Administrative Procedure Act is appropriate with respect to Executive Branch decisions to authorize legal representation of government employees in suits brought against them. With all respect, this decision seems quite plainly wrong. But right or wrong, the panel's opinion treats in summary fashion[1] an issue of such grave importance under bedrock principles of separation-of-powers that

[1] Before the panel and in its petition for rehearing, the Government argued that its decision not to provide legal representation to the plaintiff was "committed to agency discretion" under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)(1976) and was, therefore, unreviewable. The panel's opinion, after devoting fifteen pages to a recounting of the bizarre history of the courtroom activities of an extraordinarily litigation-prone plaintiff, devotes exactly one footnote to the dispatch of this contention. In articulating by way of footnote why the Attorney General's decision is not unreviewable under the analysis set forth in *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979), the opinion cites a solitary case in support of its conclusion. That case, from the 7th Circuit, had to do with a discretionary decision by the Attorney General under the Nation's immigration laws to suspend deportation of an alien. That setting is quite plainly a far cry from the determination whether to afford legal representation to an incumbent federal employee—a situation that triggers an entirely different set of both private interests and public policy considerations.

the case clearly warrants careful consideration by the entire court. I therefore respectfully dissent from the court's declination of the suggestion to rehear the case *en banc*.

The statutory provision in question, 8 U.S.C. § 517, authorizes the Attorney General to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by parties other than the United States in courts around the nation. This range of choices by the Attorney General is guided solely by the broad standard, "to attend to the interests of the United States."[2] In my view a court cannot appropriately demand reasons for litigation decisions statutorily entrusted to the Attorney General or his representatives to evaluate judicially whether those decisions, in the panel's words, "make sense" under the APA. Slip. op. at 21 n.16. Separation-of-powers doctrines, not to mention the clear language of the APA, are deeply implicated by judicial evaluations of reasons undergirding the Executive's determinations either to take or to refrain from taking actions before this branch. As the Court said in *Buckley* v. *Valeo:*

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

---

[2] Section 517 provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

424 U.S. at 138. Just as the Executive's "discretionary power to seek judicial relief" is preeminently separate from legislative powers, so also it is preeminently separate from judicial powers. The decision not to prosecute has been the archetype of unreviewable executive action. There is no reason in logic or precedent why the decision not to litigate in civil matters should be treated differently.

In wading into this formidable thicket, courts will invariably and needlessly face grave difficulties in evaluating the Executive's articulated reasons against a standard as broad as the "interests of the United States." This intrusion by the Article III branch into the discretionary judgments of a coordinate branch is particularly sensitive in the context of reviewing litigation decisions by the Executive, where various considerations of policy, tactics and the allocation of limited resources require complex and delicate balancing. As the Supreme Court has stated in another context in which it found judicial review inappropriate, "[t]hese are matters on which experts may disagree; they involve nice issues of judgment and choice ... which require the exercise of informed discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958). The difficulties inherent in judicial evaluation of Executive Branch litigation determinations will be exacerbated where, as here, the courts will not, by virtue of the "deliberative process' privilege, have access to all the information in the hands of the Executive in reaching its decision.

In my view judicial review becomes no more appropriate when the protection of the "interests of the United States" takes the form of a decision to defend—or not to defend—an employee in a suit brought against him.[3] The same broad statutory language is be-

---

[3] Indeed, the panel does not offer any rationale limiting judicial review of actions by the Attorney General under section 517 to decisions to represent government employees.

ing interpreted. The same separation-of-powers concerns and difficulties of evaluation are powerfully extant. And, critically, the Department of Justice regulations governing employee representation do not in any way surrender or significantly cabin the discretion conferred by statute upon the Executive. The regulations do not grant employees any entitlement to representation; to the contrary, the regulations merely state that the government "may" provide representation. 28 C.F.R. § 50.15. Indeed, by their terms the regulations provide that representation will not be provided when it is "not in the interest of the United States" to do so. *Id.* Unlike the panel, I see no warrant for judicial review to safeguard a set of particularized interests when the governing statute itself confers absolutely no weight upon those interests.

Inasmuch as the panel's decision repesents a significant and unjustified intrusion into the prerogatives of a sister branch and does violence to the particular statutory standard governing judicial review, I respectfully dissent.

APPENDIX D

STATUTES AND REGULATIONS

5 U.S.C. 701(a) provides in pertinent part:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

28 U.S.C. 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. 517 provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. 518 provides:

> (a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United states is interested.
>
> (b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.S.C. 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 C.F.R. 50.15 provides:

> (a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)
>
> (1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement con-

taining its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department,

other than attorneys responsible for representation of the employee unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to

that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States.

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States.

(iii) Where appropriate, that neither the Department of Justice nor any agency of the United States Government is obligated to pay or to indemnify the defendant employee for any judgment for

money damages which may be rendered against such employee;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraphs (a)(6), (a)(9) and (a)(10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that

conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and protential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever;

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

28 C.F.R. 50.16 provides:

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under § 50.16, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply;

(1) While the Department of Justice will generally refer to the employee's choice of counsel the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

Office-Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2034

In The

Supreme Court of the United States

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

vs.

EVELYN FALKOWSKI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595

OWEN PERRY
3290 West Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR RESPONDENT

OF COUNSEL:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Whether an arbitrary and capricious decision of the Department of Justice not to provide legal representation for a federal employee who is sued in her official, as well as individual, capacities by a subordinate for actions undertaken on the job is absolutely unreviewable under the Administrative Procedure Act, §§701-706.

2. If the Department's decision is not immune from review, whether the factual analysis by the Court of Appeals was proper.

PARTIES TO THE PROCEEDING

The Petitioner is the United States Department of Justice and Evelyn Falkowski is the only Respondent. The Equal Employment Opportunity Commission, a defendant/appellee below, does not seek review of any portion of the Opinion of the Court of Appeals affecting the Commission.

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No. 83-2034

In The

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October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

vs.

EVELYN FALKOWSKI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Evelyn Falkowski, by counsel, opposes the Petition for a Writ of Certiorari filed on behalf of the United States to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 719 F.2d 470. The Opinion on denial of rehearing is not yet reported. The Opinion of the District Court is unreported. These Opinions have been reprinted by the United States in an Appendix attached to its Petition, and references, unless hereinafter noted, will be to the Appendix attached to the Petition for a Writ of Certiorari.

JURISDICTION

This Court has jurisdiction, should it choose to exercise same, pursuant to 28 U.S.C. §1254(1).

———o———

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. §551, *et seq.*, as well as the statutes (28 U.S.C. §§516, 517, 519) and regulations (28 C.F.R. §§50.15, 50.16) that govern the provision of government legal representation for federal employees are reprinted in the Appendix attached to the government's Petition. This litigation also involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, *et seq.*

———o———

STATEMENT

Respondent Evelyn Falkowski began her career with the EEOC in Birmingham, Alabama in 1967, and by 1971 had become head of the Commission's newly formed office in Jackson, Mississippi. At the time, she was one of the few women professionals employed by EEOC in its Southeastern Region.

After two years, she sought return to openings in the Birmingham District Office for both personal and professional reasons. When her attempts to transfer failed, she brought suit against the EEOC alleging unequal treatment based on sex and race, and a pattern of sex discrimination in EEOC's Southeastern Region. See EF APP

1-12.[1] The matter was settled in apparently amicable fashion in the fall of 1974 when the Commission agreed to appoint Ms. Falkowski Director of the Birmingham Office. See, *Falkowski v. Powell* No. 73-P-1009-S (N.D. Ala. 9/9/74).

She was respected for opposing job segregation and vigorous enforcement of Title VII in Mississippi at the time she returned to Birmingham. The Mississippi office won an award for performance during her four year tenure. EF APP 13.

When Ms. Falkowski arrived at Birmingham, the incumbent Deputy Director, Bertram Perry, had been charged with insubordinate and abusive conduct by her predecessor. EF APP 2-3. Ms. Falkowski, who suffered the same sort of abuse as her predecessor, reported Perry's insubordination and behavior, which was oppressive to employees, black and white. DOJ 4a.

In July of 1975, her superior's response to a proposal that disciplinary charges be issued her Deputy was to publicly remove her authority without warning, hearing or advance charges. Then, while she was thus stigmatized, EEOC attempted to transfer both Ms. Falkowski and Mr. Perry from their jobs without due process. EF APP 1-12, DOJ 4a.

To stop her summary transfer, she went to Court and sought a contempt hearing in connection with her consent

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[1]Appendix references "EF APP #" refer to pages attached as Respondent Evelyn Falkowski's Appendix. These are reproduced from the Appendix for the Court of Appeals. References to the government's Appendix, attached to its Petition, are by "DOJ #a."

settlement ten months earlier. Ms. Falkowski alleged, and was prepared to prove, that the true reason her superior did not permit her disciplinary charges to be issued to Perry was because of his prejudice for Perry, who was of his same race and sex, and his residual bitterness over the Title VII litigation which preceded her return, over his objection, to Birmingham. EF APP 1-12.

Mr. Perry opposed his transfer by suing three EEOC officials, Alvin Golub, Donald Hollowell and Evelyn Falkowski, in their *official* capacities.

Hearings for both Mr. Perry and Ms. Falkowski were scheduled on short notice for the same day in different courtrooms in the United States District Court in Birmingham, Alabama.

This set the stage for the one and only time that EEOC has ever allegedly "represented" Ms. Falkowski in any of the ensuing litigation.[2] EEOC attorneys planned the defense of Perry's suit *only* with her co-defendants. They did not call her to the stand at the preliminary hearing even to rebut Bertram Perry's accusations against her (which her superior, a co-defendant, had acted upon without due process). The result was, essentially, an *ex parte* hearing by Bertram Perry, wherein he painted himself as a whistle blower and falsely accused Ms. Falkowski. Her immediate superior, who was called to the stand by EEOC attorneys, had to admit under cross-examination withdrawing her authority. EEOC lawyers had been unprepared to defend Falkowski when Perry accused her in the pre-

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[2]The Circuit Court below characterized this "representation" as "highly improper" because of the obvious conflict of interest. See Note 14 at DOJ 17a.

liminary hearing in *Perry v. Golub* because they had talked only to her co-defendants who had taken action adverse to her interests.[3] EEOC, though "representing" Ms. Falkowski, took the position at the preliminary injunction hearing that the matter involved a personality clash (which Falkowski denies), and Mr. Perry won a preliminary injunction against his transfer.

Though the accusations against her were rebutted administratively and by means of discovery which Ms. Falkowski conducted during the next year at her own expense, the *Perry* suit over Ms. Falkowski's objection was mooted without a trial on the merits after EEOC dropped its plan to transfer Perry and Falkowski. The United States Court of Appeals for the Fifth Circuit affirmed the finding of mootness, but vacated the underlying proceedings so as to spawn no consequences. EF APP 20.

Though there has never been a trial on the merits of any issues below, Ms. Falkowski's reputation has nevertheless been sullied by the *ex parte* findings, which quote implied charges from her superior, *e.g. Perry v. Golub,* 400 F.Supp. 409 (N.D. Ala. 1975). Not published is that she refuted them administratively. EF APP 1-12. The District Court compounded the untrue published record and renewed the stigmatizing findings in a now void 1978 opinion,[4] subsequent to deciding, without a trial, that the

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[3]The government has frequently taken the position that Evelyn Falkowski, who was present with private counsel, could have testified. In fact, her lawyer was there to represent her in her case against EEOC and no one ever defended her—or offered her testimony—to rebut Perry in Perry's suit.

[4]*Perry v. Golub* and *Falkowski v. Perry,* 464 F.Supp. 1016 (N.D. Ala. 1978), vacated (5th Cir. 1979). Respondent has on

(Continued on next page)

case was moot and again renewed them in a fee award after they were vacated (EF APP 20, DOJ 6a) by the Fifth Circuit.

Officials acting for the government continue to rely on vacated findings and non-binding *obiter dictum* adverse to Ms. Falkowski, ignore proof they have which no trial has enabled her to present, and deny her a hearing. In its Petition, the government relies upon these findings, as well.

Ms. Falkowski prevailed in her case in stopping her transfer. Several months later, she finally had to sue to regain her authority from EEOC. Immediately, EEOC restored it. After she again prevailed, her 1976 suit, by then consolidated with Perry's 1975 suit (*Perry v. Golub*), was deemed moot by the Alabama District Court at the same time Perry's was.

For the next two years, EEOC turned a deaf ear to Falkowski's pleas for management support and, in violation of EEOC Order 571, failed to process grievances in which she sought a non-discriminatory work environment. Perry, with a "preliminary injunction," saw a green light to become even more abusive to her and others. EF APP 18.

(Continued from previous page)

two occasions unsuccessfully sought a Writ of Certiorari from this Court to redress the difficulties caused her by the continually cited and relied upon vacated decisions. All judicial decisions involving Evelyn Falkowski as a party were appended to these prior Petitions, Nos. 79-1244 and 82-1914.

The defendant in *Falkowski v. Perry* is not Bertram Perry, her Deputy, but EEOC's agency head in 1975, Lowell Perry. A further possible confusion regarding the name Perry is that Ms. Falkowski's brother, Owen Perry, has since 1979 provided a substantial amount of her legal defense.

In July of 1977, after two years of desperation, Falkowski recorded a conversation she had with Perry regarding a warning letter.[5] The conversation commences with Bertram Perry stating to Falkowski, his boss:

> Now you had time to engage in this shit all day. You ugly white bitch. I ought to kick your ass. You stupid heifer. Well, you write another warning. This will be in your damn ass before it's over. This will be in your damn ass before it's over, you ugly bitch. . . .

Falkowski turned the tape over to her superiors as proof of her plight, DOJ 7a. They, in turn, claimed that the recording violated an EEOC regulation and tried to fire her. EEOC also sought to fire Mr. Perry, as well, *on the basis of the content of the tape recording,* DOJ 7a, DOJ 11a.

As a result, Mr. Perry reactivated his original litigation (*Perry v. Golub*) and again obtained an injunction against transfer (because EEOC used against him the recording it said Falkowski should not have made, and because of the *ex parte* record that EEOC never opposed in his mooted-without-trial suit). He also sued Ms. Falkowski again in 1978, this time because of the tape recording, and named EEOC Chair Eleanor Holmes Norton as a defendant "co-conspirator" (*Perry v. Falkowski*). Both were sued *officially* and individually, Falkowski for making the recording, Ms. Norton for using it, DOJ 8a, DOJ 9a. Ms. Falkowski was again denied legal representation

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[5]Ms. Falkowski felt exemptions in privacy legislation (18 U.S.C. §§ 2511(c) and (d)) allowed tape recording of her conversation in self-defense as pre-emptive of the EEOC agency rule prohibiting secret tape recording of phone conversations.

from the government. Norton, on the other hand, was given counsel. EEOC eventually certified that respondent was not acting *ultra vires* in connection with tape recording her conversation to corroborate her prior reports of Perry's continual abuse.

This litigation concerns the attempt of Ms. Falkowski to get reimbursement and legal defense customarily provided by the government to government employees sued officially by subordinates, here withheld for impermissible reasons and contrary to the policies and interests of the government.

Plaintiff's claim below emphasized two causes of action. First, plaintiff contended that the entire pattern of lack of support for her by EEOC from 1975 on, including failure to provide legal defense or attorney's fees in connection with the Bertram Perry suits, was a result of discrimination and retaliation by EEOC, unlawful under Title VII, growing out of her efforts to enforce the consent decree she had won in earlier litigation, and as a result of her efforts to reopen that case to cure retaliation. The second claim was that the Justice Department acted arbitrarily, capriciously and contrary to law in denying Ms. Falkowski a legal defense and in the way it reached its decision to do so.

The record was developed that at no stage of the proceedings did Evelyn Falkowski have input to the Department of Justice or any of its agencies concerning her version of the events, and that she has been denied any meaningful access to or participation in the decision concerning her defense.

Respondent alleged that the Department of Justice procedurally and substantively acted arbitrarily and ca-

priciously, and sought review under the Administrative Procedure Act.

The District Court, Smith, J., disposed of the case upon summary judgment in the three page Memorandum reprinted at DOJ 28a. Judge Smith, while finding that plaintiff had stated appropriate causes of action under Title VII and the Administrative Procedure Act, granted summary judgment for the defendants. In doing so, he accepted on their face the reasons articulated by the Justice Department for not providing a defense.[6]

An appeal was filed by Respondent Falkowski to the United States Court of Appeals for the District of Columbia. The government did not cross-appeal Judge Smith's conclusion that causes of action were stated.

The Court of Appeals, in a twenty-seven page Opinion containing numerous findings of fact, reversed. In the view of the unanimous Panel, "The issue before us in this appeal is whether the District Court moved too quickly in granting summary judgment because genuine issues of material fact remain in the case," DOJ 16a.

Finding that the government did not meet its burden of resolving all relevant factual legal issues in its own favor upon a motion (and making short shrift of the patently ridiculous reasons offered), the Court of Appeals remanded for fact-finding with respect to the Title VII

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[6]Judge Smith also dismissed the Title VII claim on the ground that EEOC recommended that the Department of Justice provide a defense. The Court of Appeals, examining the dilatory tactics of EEOC in the matter, reached a different inference and reversed. This aspect of the case is not being appealed by the government.

and APA causes of action as applicable to representation in the second Perry lawsuit, *Perry v. Falkowski.*[7] With regard to Ms. Falkowski's cause of action under the APA, the Court concluded generally:

> Moreover, the evidence suggests that DOJ may have accorded Ms. Falkowski disparate treatment under its existing regulations and practice. The rationality of the Department's decision therefore cannot be determined without further factual inquiry, and we accordingly hold that summary judgment as to this final cause of action was inappropriate. DOJ 21a. [Footnote omitted]

The Court then embarked upon a lengthy analysis of the reasons cited by the Department of Justice for not providing a defense to Ms. Falkowski, finding all of them wanting. DOJ 22a, *et seq.* The Court also relied upon material in the record, including the Report of the Staff of the Subcommittee on Administrative Practice and Procedure of the Senate Committee of the Judiciary, containing DOJ policy in representing government employees in litigation. DOJ 25a. Neither that material, nor at oral

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[7]The Court dismissed a claim for a defense with respect to the first Perry lawsuit, *Perry v. Golub,* on the grounds that the question of representation in that case had already been litigated in the United States Court of Appeals for the Fifth Circuit.

With respect to the Title VII cause of action against the EEOC, the Court stated, "it is certainly a reasonable inference that EEOC was wilfully dragging its feet because it did not wish government representation to be approved at all, or at least not in time to meet the Perry complaint. . . . Because the government failed to dispel these obvious inferences of illegal motivation and resulting harm that arise from the Commission's dilatory handling of Ms. Falkowski's request, we conclude that genuine issues of material fact remain with respect to her second cause of action." See DOJ 20a-21a.

argument, nor at any time, has the government been able to produce any evidence whatsoever showing that an employee sued in his or her official capacity has been denied representation by government supplied or financed counsel.

In defending its judgment on appeal before the Court of Appeals, the government marshalled no less than nine major arguments, including numerous subparts. Many of these arguments were technical and picky. One of these arguments, almost as an afterthought, was the proposition that the decision to provide or not provide legal help for an employee is not reviewable under the APA. The Court of Appeals disposed of this argument at Note 16, DOJ 21a, which has now become the gravamen of the government's complaint and the basis for this Petition. The government's suggestion for rehearing *en banc* was denied by an eight to three vote but produced the dissent of Judge Starr reprinted at DOJ 35a.

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REASONS FOR NOT GRANTING THE PETITION

1. The Petition has misstated the facts and misframed the question.

"Personal Feud"

The government insists on calling the underlying facts in this case a "personal feud" between Ms. Falkowski and her then Deputy. The differences between Ms. Falkowski and Mr. Perry grew out of a government employment relationship; there was no other relationship. Mr. Perry was admittedly insubordinate and racist. When Ms. Fal-

kowski became his supervisor, he was already under warning, yet Respondent's superiors sided with Perry and disapproved or rescinded any discipline she attempted. Although Evelyn Falkowski and Eleanor Holmes Norton, then Chairperson of EEOC, were both sued officially and personally for essentially the same reasons in 1978 in *Perry v. Falkowski*, Ms. Norton received representation and Ms. Falkowski did not.

To support its repetitive assertion that this is a "personal feud," the government ignores that Evelyn Falkowski had to resist abusive conduct and relies improperly on decisions which have been vacated by the Fifth Circuit so as to spawn no consequences.[8] These decisions were vacated, in part, because, as the Court of Appeals below stated, "the Fifth Circuit evidently felt it unfair to leave these preliminary findings on the record absent the opportunity for a full hearing on the merits." DOJ 6a.

The difficulty in all of this litigation is that Evelyn Falkowski has never been accorded either an informal or an adversary hearing on the issues. She has *yet* to be able to defend herself on these often repeated charges or to present an argument as to being defended. Nevertheless, the government uses bits and pieces of prior litigation, though vacated, and which it knows has been vacated. It ignores proof favorable to her in a discovery record she has not yet been able to use in a trial and claims, without

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[8]Even were they not vacated, they would still be nonbinding, as they were produced only from a preliminary injunction hearing. *University of Texas v. Camensich*, 451 U.S. 390 (1981). Further, the Court did not take into account the conflict of interest of the only counsel entering an appearance for Ms. Falkowski. See, *Wood v. Georgia*, 450 U.S. 261 (1981).

citation, support from an "unusually detailed" "public record." Petition at Page 21.

Misframed Question

The government has also misframed the question. Evelyn Falkowski was sued *officially* as well as individually. EF APP 16. She is most certainly one of the few persons in history sued as an official of the United States (and thus as an arm of the United States) not defended by the government. The question, as stated by the government in the Petition, concerns a suit against a federal employee in her "personal" capacity. This framing of the question overlooks the fact that Evelyn Falkowski was sued in her official capacity also, and further, that EEOC certified that Ms. Falkowski was not acting *ultra vires*. It is the position of Respondent that a case based upon a misframed question and a misquoted record should not be reviewed by this Court.

2. The decision of the Court of Appeals with respect to applicability of the APA is correct.

The government seeks unreviewable discretion with respect to the provision of counsel to its employees. It claims that freedom by arguing that the decision to provide representation to an employee is wholly committed to agency discretion and thus exempt from review.[9] The government also takes the Court of Appeals to task for its analysis of the problem at Note 16, DOJ 21a.

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[9]The government also appears to complain, Petition at Page 21, that review of this type decision will invade the attorney/client privilege. The privilege, however, if present, belongs to the client or potential client, such as Evelyn Falkowski. It is her privilege to waive, not that of prospective government lawyers, and she may do so in APA litigation.

We believe that this Court settled that argument in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971) at 410. As this Court stated in *Overton Park,* the "agency discretion" exception to APA review is very narrow and only applies in those cases where, essentially, there are no standards and thus nothing against which to measure an administrative decision.

In this case, there are statutory, constitutional and regulatory standards. Perusal of 28 C.F.R. 50.15,[10] DOJ 40a, *et seq.,* establishes that the government must determine whether the employee who is seeking representation was acting within the scope of authority, and must perform full fact-finding so as to determine the interests of the United States. In the Falkowski case, the disregard for the requirements of Title VII and the Constitution, the lack of government fact-finding, the refusal to hear Ms. Falkowski, and the patently ridiculous reasons advanced for not providing defense counsel all show that the decision not to provide Ms. Falkowski a defense involved impermissible considerations and was arbitrary and capricious.

The Justice Department clearly has a bone to pick with the United States Court of Appeals for the District of Columbia Circuit. In essence, the government does not like *Natural Resources Defense Council, Inc. v. S.E.C.,* 606 F.2d 1031 (D.C. Cir. 1979). That case provides a three part test for determining the scope of judicial review of certain agency decisions. In view of *Overton Park,* it can hardly be argued that the government has broad, unreview-

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[10]These regulations existed in essentially the same form at the time of the relevant events. Court of Appeals Opinion at Note 13, DOJ 14a.

able powers; rather, the government seems to be upset that the D.C. Circuit has supposedly adopted a pragmatic test rather than one that relies heavily on legislative history. That issue is being vigorously pressed by the government in *Chaney v. Heckler,* No. 83-1878, litigation concerning the FDA role in approving use of lethal injections in death penalty cases, in which this Court recently granted a Writ of Certiorari, *Id.,* 52 U.S.L.W. 3902 (U.S. June 19, 1984). Irrespective of *Chaney* and the applicability of *Natural Resources,* in *this* matter the Court of Appeals was clearly correct. Also, this is not a *Chadha* type issue of executive prerogative, *I.N.S. v. Chadha,* — U.S. —, 103 S.Ct. 2764 (1983), but involves deprivation of due process clearly subject to check by judicial action. See, *e.g., Green v. McElroy,* 360 U.S. 474 (1959). The government does not urge the Court to overrule *Overton Park.*[11] Since *Overton Park* so clearly controls—and supports—the Court of Appeals ruling in this case, we fail to understand what all the excitement is about. Indeed, it almost appears as if the government is stretching for any vehicle it can find to redress its differences with the D.C. Circuit over the reach of the APA. This case, however, clearly is the wrong vehicle.

This is a case where the issue is whether an agency decision to single someone out for discriminatory treatment arguably based on race, sex and other impermissible factors is subject to judicial review. Discriminatory treatment based on race and sex is contrary to public policy,

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[11]Nor does *Overton Park* stand alone on this point. See *Dunlop v. Bachowski,* 421 U.S. 560 (1975) (review of decision of Secretary of Labor not to sue to invalidate a union election); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967).

Bob Jones University v. United States, — U.S. —, 103 S.Ct. 2017 (1983), *McLaughlin v. State of Florida,* 379 U.S. 184 (1964), *Hishon v. King and Spalding,* — U.S. —, 104 S.Ct. 2229, 81 L.E.2d 59 (1984), and not to be tolerated merely because the government alleges it to be "discretionary." See *United States v. Nixon,* 418 U.S. 683 (1974).

3. The factual analysis of the Court of Appeals was correct.

Plaintiff alleged a clearly arbitrary and capricious decision by the Justice Department. Objective external data supports this conclusion (the government is unable to provide any indication of any government employee sued in an official capacity by a subordinate who has not been defended by the government); the government's own descriptions of its policy, which are, indeed, in the record in this case, show that government employees have *always* been defended, DOJ 24a-25a; and the reasons given for turning down Ms. Falkowski are impermissible, not "rational," do not "withstand scrutiny," and are not "satisfactory." DOJ 23a-24a.

The first reason advanced by the Department of Justice for not representing Ms. Falkowski was the "clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry." As the Court of Appeals found, government counsel represent "federal officials as defendants in quite acrimonious Title VII actions on a regular basis." DOJ 23a. The *Perry v. Golub* litigation had its origins in a Title VII claim by Bertram Perry. The second reason given was the tape recording by Ms. Falkowski which was, from EEOC's point of view, in contravention of an EEOC directive. The Court of Appeals dismissed this reason, as well, noting that the government has defended numerous

persons under criminal investigation by the Department of Justice and has hired private counsel to do so in cases of conflict of interest. The third reason, which the Court found "the least satisfactory of all" was the existence of litigation by Ms. Falkowski herself against the government. The Court of Appeals found that the proposition that federal officers become ineligible for government-provided legal defense because they, themselves, have challenged earlier personnel actions, is "an impermissible burden on the rights granted federal workers by Congress and the Constitution." DOJ 24a. See, *Sherbert v. Verner*, 374 U.S. 398 (1963).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, VA 22313
(703) 836-6595

OWEN PERRY
3290 W. Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR
RESPONDENT

Of Counsel:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

August 1984

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 81-1776
SMITH, J.

EVELYN FALKOWSKI,

Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION ET AL.,

Defendants.

AFFIDAVIT OF EVELYN FALKOWSKI

I am Evelyn Falkowski, and I am the plaintiff in this action. I have read the memorandum to which this affidavit is attached, and hereby affirm that the memorandum and the foregoing is true to the best of my knowledge and belief:

EARLY CAREER IN CIVIL RIGHTS FIELD:

Since early adulthood I have worked against racial segregation, beginning in Georgia, where segregation was once enforced by law, and continuing through my college years (all completed at night) to the present time. Twice in the early sixties I paid for stands against white racism by anonymous bomb threats to my home in Alabama. Once was at the time of the "Anniston bus burning". In late 1967, after successful government service, I began my career with EEOC's new Alabama office and later opened EEOC's Mississippi Office. My first years with EEOC were happy and productive. See Exhibits A, B, and C.

PURSUIT OF A NON-DISCRIMINATORY WORK ENVIRONMENT:

The EEOC's Atlanta Region moved from predominantly white male in the upper ranks to predominantly black male. The strictures of equally filling positions through the civil service system eased because of new concepts of recruitment, qualification, and merit, as well they should have. For women in EEOC, however, unlike the case with black men, change was slow, especially in the South. During the first four years of existence of EEOC's Birmingham District Office, I was the only woman of approximately the first one hundred professional hires. In 1971, when I obtained a management position in the EEOC Jackson, Mississippi Office, which I opened, five similarly qualified men had turned the job down.

Later, I sought to return to Birmingham when the Jackson Office was functioning well, when there were vacancies, because of my husband's health. When nothing worked, including my offers to accept lateral or downward transfers, I finally filed a law suit. Many of the vacancies were not filled from within. When I filed the suit, all eight jobs at GS-13 or higher in EEOC's Birmingham District Office were held by men, and seven were black. Throughout the eight-office Atlanta Region, no woman other than myself had attained supervisory, much less management level. On the eve of trial, my suit was settled by what was said to be an "amicable agreement". Two months later I was District Director in Birmingham.

Unlike the Mississippi Office, the Birmingham Office had an admitted history of four years of internal strife, much of which centered around Bertram Perry, by then

the Deputy Director. Yet I believed he and I could work together and bring better feeling. His disruption and abuse was such that I had to change my mind and seek concurrence to issue disciplinary warnings, but the concurrence was withheld by my supervisor, the Atlanta Regional Director, like Perry, a black man. My predecessor, also black, had transferred and refused to sign an agreement to the effect that the same deputy would drop grievances against him, and he would drop proposed discipline. (Exhibit D). But my predecessor had no stigmatizing action taken against him when his transfer was arranged. As a white female, I was not to be so fortunate.

EFFORTS TO STAY ON THE TEAM DURING 1975

Bertram Perry yelled criticisms about our superiors and subordinates from the beginning. He terrorized the staff. Subordinate supervisors unanimously complained that he was abusive. My attempts to counsel Perry met defiance. Then I asked for and obtained a conference with my supervisor in Atlanta. I carefully sought to enlist support. It was first granted, then withdrawn, and it was clear that my performance would be closely scrutinized. I communicated carefully and with patience.

HISTORY OF ABUSE OF RIGHTS BY EEOC

It is ironic that after I checked the law regarding recording of my conversation (Excerpt, Exhibit E), EEOC and Justice abandoned me for allegedly violating EEOC Order 165. Many regulations and laws have been broken in violation of my rights, including, I believe, the Constitution, and these by EEOC. This forced my lawful action:

1. I was not permitted to discipline persons who defied authority.

2. While a recommendation for disciplinary charges against my deputy was pending, my authority as EEOC Birmingham District Director was removed without warning, hearing, or charges.
3. Grievances I filed were not acknowledged.
4. Discrimination complaints I filed were not processed.
5. When charges were finally issued against me they were not upheld, but my request for a written decision as provided by regulations was ignored, as was my attorney's written request.
6. My authority was not restored when the charges were dropped, until four or five months later, when I filed a new lawsuit.
7. Within two weeks after I filed suit, my authority was restored, but without any effort by the agency to restore my credibility with staff.
8. I was ordered to let supervisors hire their own staff, and could not moderate performance appraisals or overrule the deputy director on any personnel decision.
9. Grievances were generated against me and processed expeditiously. My grievances were ignored. Grievances were granted against me without my being heard.

On August 15, 1975, EEOC notified my deputy and me they had investigated and discovered problems, and we would be detailed and then transferred. I held the Birmingham location as a result of a consent order. He, because of a "second chance". My deputy sued me and our superiors, who had not accorded him a hearing as I had recommended. His complaint was served only on government counsel and I did not see it.—Resulting adverse findings have been used against me ever since, though the dis-

trict court has said it might have been different had I been heard or had there been a trial.

My calls for legal help were ignored. Meanwhile, believing Bertram Perry was entitled to preliminary relief on due process grounds, I set about to prevent my own transfer. I succeeded on August 29, 1975.

But that same day, my deputy won findings that he had exposed my misconduct and was a "whistle blower". EEOC managers above my level had evidence that my supervisor's accusations when he removed my authority were based on reports from Bertram Perry and were groundless. They protected my co-defendant and did not cross-examine Perry. Thus he prevailed. Government counsel gave me no chance to take the stand.

Later, EEOC did not support my motion for reconsideration. They did not respond to my request that they conduct discovery which would clear my name. (Exhibit F-1). They did not support my discovery. (F-2). They did not support an agreement whereby findings adverse to EEOC, including me, might have been withdrawn, and they did not suport my appeal which finally ended the district court's injunction preventing action against Bertram Perry for past misconduct, retained after the court decided without a trial that his case was moot. But now defendants contend that EEOC represented me; that our interests were not adverse.

EEOC's EEO Director found Bertram Perry to be a whistle blower based on the district court decision for him in 1975, wherein he won a preliminary injunction. After that, the district court made more findings favoring Perry, using as evidence that the EEO Director's findings in his

favor were rescinded by the agency. Now that decision has been vacated.

When my transfer was prevented after a hearing, EEOC agreed to withdraw the transfer order, and there were no findings. But for me, one decision in violation of due process feeds another. I continue to be found guilty of that which I have disproven. If I receive any help at all from civil libertarians in EEOC, the answer is, "it's moot".

In appealing a fee award to my former subordinate, the EEOC admits he was insubordinate, that supervisors testified he called me obscene names, countermanded orders, threatened and accused. EEOC then blames me equally for conflict. In opposing fees to me as a prevailing party, EEOC tells the Eleventh Circuit I was found guilty of "irregular" actions and physical assaults, based on hearsay, incredible, and inadmissible evidence, and despite no charges against me having been upheld on any grounds, and none having been brought against me at all for some of the alleged offenses.

HISTORY OF ATTEMPTS TO RESOLVE TITLE VII COMPLAINTS ADMINISTRATIVELY

Charges I filed under Title VII against EEOC which were ostensibly settled by consent order in 1974, are not really resolved. I never cashed the check for $565. because when it was proffered, reprisals had started again. I was asked to waive past and future claims. (Ex.G).

My charges because of lack of management support in 1975 are still pending administratively.

The pending appeal of these 1975 charges was acknowledged by EEOC's Office of Appeals and Review by letter

dated November 6, 1981, with attachments which indicate that the EEO Office asked that the appeal be considered without reference to the underlying record, which comprises ten volumes. (Exhibits H-1 thru H-6).

By memo dated December 12, 1976, I amended charges filed July 9 and August 15, 1975, and dismissed without prejudice by the District Court, Northern District of Alabama, on November 30, 1976, to raise issues of continuing retaliation. (Exhibit I)

By letter dated October 16, 1980, EEOC acknowledged a number of EEO charges by me, excluding two not located pertaining to discriminatory lack of legal defense and discriminatory lack of discipline to a subordinate guilty of insubordination. (Exhibit J).

A charge filed by me by memo dated August 4, 1976, and a decision by the EEO Director dated June 7, 1977, reflects a pattern of response to allegations of reprisal which I never had opportunity to discuss with anyone above my immediate level in management. (Exhibits K-1 - K-2).

A charge filed by me under date of December 14, 1976, amends earlier charges dismissed by a court without prejudice, and raises issues including: "I tend to be blamed for an agency-acknowledged pattern of disruption and insubordination of one permitted equal or greater rank and credit and hearing." (Exhibit L).

A certified letter from me to then EEO Director Maxine Cade, dated June 15, 1977, documents that I asked for an evidentiary hearing following her proposed disposition of my July 9, 1975, discrimination complaint, as one option she suggested. I also made further efforts to communi-

cate, in the absence of other available channels. (Exhibit M). Hearing was scheduled. (Exhibit M-2). No hearing took place.

Under date of February 6, 1978, I filed a charge alleging new reprisals continuing from November 7, 1977, when EEOC sought court permission to fire me. On May 19, 1978, through a counselor, I requested an audience with headquarters superiors which never occurred. (Exhibit N-1 - N-2).

Under date of November 10, 1978, I filed an internal discrimination complaint because of EEOC's failure, within the past month, to provide legal defense customarily provided its officials when sued by subordinates. The unacknowledged complaint, sent by certified mail, concludes:

> EEOC's failure to defend me in Court in 1975 irreparably damaged my reputation and harmed the Agency (See Ex.A), and within the past month EEOC has ignored my request for legal defense though a law suit is pending against me for action I took in defense of the public, other employees, and myself, within a right provided by law to protect credibility in a conversation to which one is a party.
>
> EEOC has no true conflict of interest with me, because I support and work for its mission and lawful policies and have protested responsibly within machinery provided by law. EEOC's denial to me of access to legal counsel has prevented understanding and defeated its legal objectives.[1]
>
> [1]Although EEOC may pay legal fees in the future the divided front in presentation of the defense has unnecessarily complicated the defense of the lawsuit as well as placed a burden on me of having to advance counsel fees initially. (Exhibit O-1 - O-4.)

Records of Counselling contacts and other correspondence show that EEOC's position to the counselor was:

> "12/5/78—Interview with Nick Inzeo of the Legal Counsel Division; Headquarters. EEOC can not provide Legal Defense. Justice Dept. will handle."

Attempts to attain equal administration of discipline were equally futile. (Exhibits P-1 - P-5). As were all requests for audience.

In May 1981, I filed a new discrimination complaint because of EEOC's continuing unfairly to treat me as a wrongdoer, failing to help me clear my name, and failing to support me in seeking published decisions to show that prior decisions adverse to the agency, including to me, were vacated so as to spawn no consequences, and continuing to impute fault in me to the courts. On June 26, 1981, EEOC's EEO Director rejected the complaint. On August 13, 1981, the same person acknowledged its receipt without reference to the prior letter, and told me I would be advised later whether the charge was accepted or rejected. (Exhibits Q-1 through Q-6).

The foregoing do not comprise all discrimination complaints I filed, but reflect the general pattern. After my transfer to Washington in January 1979, the pattern of retaliation continued. The person who offered me the position in Washington, a Caucasian male, was according to my information and belief, himself forced out of his position within a few months, and his position was awarded to a black man. I was too intimidated to file charges about numerous retaliatory acts which occurred, and also too burdened with trying to pursue charges I filed six years ago, which I pursue primarily because of my faith and con-

viction that a more discrimination-free work environment can exist in this country.

HISTORY OF ATTEMPTS TO COMMUNICATE WITH THE JUSTICE DEPARTMENT

For five years, I attempted to communicate the merits of my position with the Justice Department. I was, due to EEOC's interference and the actions of others in the Justice Department, ignored. To penetrate the barriers, I hired counsel last year whom I hoped would be able to cause implementation of the routine process of having the Justice Department arrange legal defense for an agency supervisor sued in official capacity by a subordinate. That the Justice Department afforded my former counsel a "hearing" (consisting of a conversation, essentially, at which I was not present) does not constitute a hearing to me. My former counsel did not know my answers to what they told him. His report includes the following items told him:

> "The fact that the EEOC had not requested that DOJ provide reimbursement was a big factor."
>
> "The U. S. Attorney in Birmingham has strongly urged the DOJ to stay out of the case, and not to provide representation. He has stated that the matter has been all over the newspapers."
>
> I violated EEOC Order 165, which prohibits my recording my conversation.
>
> Those responsible for the decision do not believe it is in the interest of the government to defend me.

HISTORY OF ATTEMPTS TO COMMUNICATE WITH EEOC ATTORNEYS

When I read in a Birmingham newspaper, in 1975, that Bertram Perry had sued me, I was engaged in explaining

to counsel retained on short notice the situation regarding EEOC's attempt to transfer me from a location I had just won after a consent order. I hoped for an appropriate opportunity to communicate with EEOC counsel, and attempted to contact the Legal Counsel Division in EEOC headquarters regarding my defense from the Perry suit against me and other officials. I was told that Izzie Jenkins was no longer over Legal Counsel as she had been promoted. (Ms. Jenkins, formerly with the Justice Department, has since had supervisory authority over persons in the Legal Counsel Division). I was unsuccessful in reaching her successor, Ms. Connie Dupre. It was my understanding that the counsel I retained to represent me as a plaintiff would see that I was protected in Perry v. Golub. I did not understand that they did not consider this important at the preliminary hearing stage—in fact, when I realized the Perry hearing was ending without my being heard, I objected to my counsel, but it was too late. In the Perry hearing, the lead attorney was Mr. Joseph McCormack, representing EEOC defendants according to record of the hearing. He did not cross examine Mr. Perry. He did not call me to the stand. At an EEOC training session a year later, Mr. McCormack would not talk with me. Ms. Jenkins will not talk with me. Recently I have asked, not that EEOC assist me in gaining attorney's fees from my former deputy (Ex.R). I have asked that they assist in getting findings on the merits made in a fee award to him vacated, because such findings flout the opinions of the Fifth Circuit which affirmed mootness and vacated underlying proceedings so as to spawn no consequences. Instead, EEOC, which has repudiated the district court decisions as to Mr. Golub and Mr. Perry, has said they are supported as to me, and offered hearsay, inadmissible, and incredible evidence to prove it.

EVIDENCE OF PRETEXTUAL OR IMPERMISSIBLE DEFENSES

The Justice Department, in a staff report to Congress, listed numerous male federal officials sued for whom the department has provided or arranged legal defense. Yet the Justice Department finds it not to be in the interest of the government to defend the one woman who pioneered as a manager in EEOC's Southeastern Region, sometimes angering companies against whom she found reasonable cause to believe they discriminated. The Justice Department doesn't question why the subordinate who sued her received years of free legal support from an attorney who represented companies charged with discrimination before EEOC. The Justice Department doesn't examine the causes of her poor image, or have anyone hear her side of the story. It doesn't inform itself of the facts, and doesn't even accept documents from her.

In the same report the government defense of Richard Nixon, John Mitchell, and others charged with watergate crimes is noted. And a footnote points out:

> "The Department has always represented all government employees sued in their official capacities as mandated by its statutory responsibility under 28 U.S.C. § 516." (Exhibit S).

I swear that the foregoing statement, consisting of seven pages, is true to the best of my knowledge and belief, as is the memorandum to which it is attached.

/s/ Evelyn Falkowski

Subscribed and sworn to before me this 25th day of November, 1981, in Alexandria, Virginia.

/s/ Jennifer Ayers
Notary Public

My commisison expires March 26, 1985.

APPENDIX B

AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, Michael Raff, hereby depose and give as my sworn statement:

(1) I am the Executive Director of the Mississippi Council on Human Relations, a private non-profit agency that functions throughout the State of Mississippi. The primary purpose of the Council is to initiate and support activities that assist Mississippians in obtaining and securing their basic human rights.

(2) It was in this capacity as Director of the Council that I first met Ms. Evelyn Falkowski in 1971. At that time she was serving as District Director of the Jackson District Office of the Equal Employment Opportunity Commission.

(3) My personal reaction to Ms. Falkowski from the very beginning has been very favorable. She has sensitive, warm personal concern for people both on and off the job. But it is to her professional competence that I can speak most authoritatively. Due to the nature of my work, I have had almost weekly contact with the Jackson District Office of the Equal Employment Opportunity Commission for the past three years. I have seen Ms. Falkowski build the Jackson District Office from one to over forty employees. I am impressed by the initiative she took in building a staff that in only a couple of years has made the Jackson District Office one of, if not the most, successful in the Region.

(4) In February, 1974, the Mississippi Council on Human Relations completed a four-month investigation of the hiring practices and patterns of state agencies. After studying 68 agencies, we found 44 had yet to hire their first Black person.

(5) After our investigation was made public, the Council was called upon by individuals to file charges with the Jackson District Office of the Equal Employment Opportunity Commission on behalf of persons claiming to be aggrieved by specific state agencies. The Council, as the third party, filed some charges against nine of the largest state agencies in Mississippi that were refusing to hire Black people.

(6) The assistance I received from Ms. Falkowski and her staff was outstanding. Due to the large number of aggrieved persons (Mississippi is 38% Black) she directed her staff to give our charges immediate attention. Determinations were made and negotiations were begun with these nine state agencies.

(7) After lengthy negotiations, a settlement was made with only one of the nine agencies. The EEOC office, under Ms. Falkowski's creative direction, worked endlessly attempting to get these agencies to sign a contract that they would hire Black people. The agencies refused. Consequently, lawsuits are being filed. During all this time, I have been very impressed with Ms. Falkowski's competence and strong interest into having Black people employed by state government.

(8) The success of the Jackson District Office of the Equal Employment Opportunity Commission rests

largely because of Ms. Falkowski and her ability to hire competent and industrious staff.

/s/ Michael Raff

Sworn to and subscribed before me on this the 22nd day of August, 1975.

/s/ illegible
Notary Public

My Commission Expires:

My Commission Expires August 30, 1978

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-78-M-0935

BERTRAM N. PERRY,

Plaintiff,

vs.

EVELYN FALKOWSKI, individually and as Executive Director, Birmingham District Office, U. S. Equal Employment Opportunity Commission; ELEANOR HOLMES NORTON, as Chairman, U. S. Equal Employment Opportunity Community (sic); and X Y and Z whose names are unknown at present but will be named by amendment when ascertained,

Defendants.

C O M P L A I N T

(Filed August 24, 1978)

Jurisdiction of this Court is invoked pursuant to 28 USC 1343 18 USC 2520. This is a civil action pursuant to 18 USC 2520 seeking actual and punitive damages for the unlawful acts of Defendants. Jurisdiction is also invoked to redress the deprivation of rights of Plaintiff protected by First, Fifth and Fourteenth Amendments to the Constitution of the United States. 42 USC §§ 1981, 1985 and 1986. This suit further seeks Declaratory and Injunctive relief pursuant to 28 USC §§ 2201, 2202 and 42 USC §2000-e et seq.

1. Plaintiff is a Negro resident citizen of Birmingham, Alabama and resides at 228 - 10th Avenue, S.W.

2. Plaintiff is an employee of the U. S. Equal Employment Opportunity Commission and serves as Deputy Director of the Birmingham District Office, of said commission.

3. Plaintiff avers that on or about November 7, 1977, the United States Equal Employment Opportunity Commission, hereinafter referred to as EEOC, filed a petition before the Hon. J. Foy Guin in case number 75-G-1476 Perry v. Golub, United States District Court for the Northern District of Alabama, Southern Division.

APPENDIX D

CERTIFIED MAIL 441196

Robert Jeffrey, Sr., Regional Director, 9/29/78
ATRO

Evelyn Falkowski, Director,
BIDO

Supplemental or Amended Petition to be Filed in Court Stating Further Charges Against Bertram Perry

As you know, I have reported abusive and/or insubordinate conduct by Bertram Perry, Deputy Director, against me, and this has occurred very frequently since the court proceedings. The last hearing was in June. With regard to making known to the court further disciplinary problems with Bertram Perry, you promised to get back to me. To date, the court has not ruled on the original petition. Neither have additional grounds based on subsequent misconduct of Bertram Perry been made known to the Court by the agency.

The situation is such that almost always when I try to communicate with Perry he makes abusive remarks to me, when I note the remarks he harasses me while I am in process of noting the remarks, and then I have to give him written instructions and continue working with and through him in the face of his open defiance and angry yelling about me.

I hereby request that you arrange to have the legal counsel division contact me for information and documentation so that additional pleadings may be filed. Otherwise, I believe the agency will be derelict in not making known a situation that continues to be untenable for a federal agency to tolerate.

There appears to be no way to provide interim relief to me from Perry's harassment, short of detailing him out of the office. I now ask that misconduct subsequent to the initial petition be made known to the court. This is a reiteration of previous verbal requests. Further, I re-institute my grievances based on continuing defiance of direction by Perry, and I ask that effective steps to end this be tried by the agency filing new pleadings in court.

CC: Ms. Charlotte Frank, Director, Office of Field Services

APPENDIX E

DO NOT PUBLISH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1719

BERTRAM N. PERRY,

Plaintiff-Appellee,

v.

ALVIN GOLUB, ET AL.,

Defendants-Appellees,

EVELYN FALKOWSKI,

Movant-Appellant.

No. 77-1865

EVELYN FALKOWSKI,

Plaintiff-Appellant
Cross-Appellee.

v.

LOWELL PERRY, Chairman, ETC., ET AL.,

Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

(April 25, 1979)

Before WISDOM, CLARK and FAY, Circuit Judges.

PER CURIAM:

The district court correctly dismissed these actions without prejudice on account of mootness. The effect of such dismissals was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudi-

cation of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties in either case. The orders of dismissal, without prejudice, are affirmed but the "protective orders" or injunctions are vacated.

AFFIRMED and VACATED.

Office-Supreme Court, U.S.
FILED
SEP 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2034

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

EVELYN FALKOWSKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

9 pp

In the Supreme Court of the United States

OCTOBER TERM, 1984

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UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

Respondent has not provided any reason why certiorari should not be granted in this case.

1. Respondent notes (Br. in Opp. 13) that she was sued by Perry in her official as well as her individual capacity. She appears to suggest (Br. in Opp. 13) that whether or not government attorneys were provided to represent her in her individual capacity, the government was obligated to represent her in her official capacity.

This argument is a red herring. Perry's complaint named Eleanor Holmes Norton, then chairman of the Equal Employment Opportunity Commission, as a defendant in her official capacity (App., *infra,* 1a). The complaint also named respondent as a defendant in both her official and individual capacities (*ibid.*). The complaint sought a

declaratory judgment that the recording of Perry's conversation with respondent and his attempted discharge violated his statutory and constitutional rights (*id.* at 3a). It also sought actual and punitive damages (*ibid.*).

The government never refused to represent respondent in her official capacity. Since a suit against a government official in his or her official capacity is in effect an attempt to obtain relief from the government itself, the government always provides representation in such cases. In the present case, the United States Attorney and attorneys for the EEOC entered an appearance for Norton and successfully defended against Perry's suit insofar as it sought relief from the Commission. Thus, government attorneys effectively represented respondent's interests insofar as she was sued in her official capacity.

The Justice Department advised that respondent should submit a request if she wanted representation in her individual capacity (see 28 C.F.R. 50.15(a)(1)), and by letter to the EEOC general counsel, respondent sought such representation. See C.A. App. 102. This request was subsequently denied by the Department "pursuant to 28 C.F.R. § 50.15(a)(2)" (Pet. App. 30a), a provision that applies exclusively to the representation of a federal official or employee who is "sued, subpoenaed, or charged in his individual capacity" (see 20 C.F.R. 50.15(a)). It was this denial of representation that the court of appeals reviewed.

2. Contrary to respondent's contention (Br. in Opp. 15-16), the government has not argued that a refusal to provide representation on the basis of race or gender would be exempt from judicial review. As noted in the petition (at 10 n.6), the sole issue in this case is whether representation decisions are reviewable under the Administrative Procedure Act (APA), which permits agency action to be set aside if it is "arbitrary, capricious, [or] an abuse of discretion" (5

U.S.C. 706(2)(A)). Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* — which is the "exclusive and pre-emptive" remedy for claims of discrimination against federal employees (*Brown* v. *General Services Administration,* 425 U.S. 820, 829 (1976)) — an employee may sue his or her employer to contest the denial of representation on grounds of discrimination. Respondent herself included such a claim in her complaint in this case (see Pet. App. 19a-21a).

3. The question whether the government's representation decisions are reviewable under the APA is similar to one of the questions now before the Court in *Heckler* v. *Chaney,* No. 83-1878. As explained in the petition in the present case (at 9 & n.5), we believe that consideration of this case together with *Chaney* may be helpful to the Court. Accordingly, if certiorari is granted in this case, we would be prepared to file our brief on an expedited basis so that the two cases could be argued and considered together.

For these reasons and the reasons set forth in the petition, it is respectfully submitted that the petition should be granted.

REX E. LEE
Solicitor General

SEPTEMBER 1984

DOJ-1985-09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERTRAM N. PERRY, PLAINTIFF,	]	
VS.	]	
EVELYN FALKOWSKI, individually and as Executive Director, Birmingham District Office, U.S. Equal Employment Opportunity Commission; ELEANOR HOLMES NORTON, as Chairman, U.S. Equal Employment Opportunity Community; and X Y and Z whose names are unknown at present but will be named by amendment when ascertained.	]	Civil Action No. 78-PT-935S
DEFENDANTS.	]	

[Filed: Aug. 24, 1978]

COMPLAINT

Jurisdiction of this Court is invoked pursuant to 28 USC 1343 18 USC 2520. This is a civil action pursuant to 18 USC 2520 seeking actual and punitive damages for the unlawful acts of Defendants. Jurisdiction is also invoked to redress the deprivation of rights of Plaintiff protected by First, Fifth and Fourteenth Amendments to the Constitution of the United States, 42 USC §§ 1981, 1985 and 1986. This suit further seeks Declaratory and Injunctive relief pursuant to 28 USC §§ 2201, 2202 and 42 USC § 2000-e et seq.

1. Plaintiff is a Negro resident citizen of Birmingham, Alabama and resides at 228 - 10th Avenue, S.W.

2. Plaintiff is an employee of the U. S. Equal Employment Opportunity Commission and serves as Deputy Director of the Birmingham District Office, of said commission.

3. Plaintiff avers that on or about November 7, 1977, the United States Equal Employment Opportunity Commission, hereinafter referred to as EEOC, filed a petition before the Hon. J. Foy Guin in case number 75-G-1476 Perry v. Golub, United States District Court for the Northern District of Alabama, Southern Division.

4. Plaintiff avers that said Petition was filed seeking approval to process adverse action against the Plaintiff herein, to discharge Plaintiff from federal service after twelve (12) years of loyal and competent service.

5. Plaintiff avers that as a basis of said proposed adverse action, Defendant, EEOC by and through its agents, acting within the full scope and authority of their official capacity did willfully and maliciously disclose the contents of a taped conversation between Plaintiff, Bertram N. Perry and Defendant, Evelyn Falkowski.

6. Plaintiff avers that on or about July 18, 1977, Defendant, Evelyn Falkowski, while acting within the full scope of authority of her official capacity provoked the Plaintiff for the express purpose of obtaining statements from him, and further that said Defendant, without the knowledge or consent of Plaintiff, did cause said statements to be recorded by a hidden recording device for the purpose of causing injury to Plaintiff with respect to Plaintiff's employment, in violation of 18 USC §§ 2511-2520, EEOC Order 165 and Plaintiff's First Amendment Rights under the United States Constitution.

7. Plaintiff avers that Defendant, Eleanor Holmes Norton, as Chairman of the EEOC, did effectuate discharge proceedings against the Plaintiff, as a result of the disclosure of said tape recording, with full knowledge of the unlawfulness of the use of same, with the intent to cause injury to Plaintiff's employment status in violation of 18 USC §§ 2511-2520 and in violation of the Plaintiff's First Amendment rights under the United States Constitution.

8. Plaintiff further avers that the unlawful acts of Defendants complained of herein were commited against Plaintiff because of his race, in violation of 42 USC § 2000-e et seq.

WHEREFORE PREMISES CONSIDERED, Plaintiff respectfully prays this Court to advance this cause on the docket, order a speedy hearing at the earliest practical date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiff a Declaratory Judgment that the actions of Defendants complained of herein violate the rights of Plaintiff guaranteed by 18 USC 2511-2520, 42 USC §§ 1981, 1985, 1986, 2000-e et seq., the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. Grant Plaintiff an award of $200,000.00 in actual damages.

3. Grant Plaintiff an award of FIVE MILLION ($5,000,000.00) DOLLARS as punitive damages against the Defendants for the wrongful and unlawful acts heretofore complained of.

4. Allow Plaintiff his costs herein including a reasonable attorneys fee as provided by 42 USC § 2000-e 5(k), and 18 USC § 2250.

5. Grant Plaintiff such other additional relief as may appear to the Court to be equitable and just.

Respectfully Submitted

_____

BERTRAM N. PERRY

Plaintiff demands trial by struck jury on all such issues.

_____

Office - Supreme Court, U.S.
FILED
SEP 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2034

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

EVELYN FALKOWSKI,
Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595
OWEN PERRY
3290 West Big Beaver Road
Suite 510
Troy, Michigan 48084
COUNSEL FOR RESPONDENT

OF COUNSEL:
MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005
EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507
HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036
EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

NO. 83-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE,

Petitioner,

v.

EVELYN FALKOWSKI,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Supplemental Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to Rule 22.6 of the Rules of this Court. Since the filing

of the respondent's original Brief in Opposition to the government's Petition in this case, the government has by means of its Reply Brief raised a new argument not heretofore raised in these pleadings. This Supplemental Brief will address that intervening matter.

STATEMENT

The government's Reply Brief introduced to this Court the argument that a federal employee may contest the denial of legal representation on the grounds of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq. The government argues that since Title VII is the "exclusive and pre-emptive" remedy for claims of discrimination (citing Brown v. General Services Administration, 425 U.S. 820, 829 (1976)), therefore a federal employee

in the situation of Evelyn Falkowski has proper redress in the courts pursuant to Title VII and need not and cannot utilize the Administrative Procedure Act.

ARGUMENT

The government's Reply introduces to this Court the argument that Title VII is the only authority by which race or gender discrimination or reprisal may be challenged by plaintiff Falkowski with respect to her not being provided legal representation. What is thoroughly astonishing is that the government took the contrary position below.

The government's position in this case has always been that the decision to provide or not provide representation to Falkowski rested ultimately with the Justice Department. Since the Justice

Department was not her employing agency, it is not subject to Title VII. EEOC, which is subject to Title VII as her employing agency, did not have the authority to provide counsel. Accordingly, the government argued that Title VII could not be used by plaintiff to seek redress with respect to the denial of representation. In view of this past record, how the government can now argue to this Court that Title VII is, indeed, available to Ms. Falkowski to challenge the denial

of legal fees, defies comprehension.[1] Further, if, as the government now claims, Title VII is the exclusive remedy in this case but is not available to challenge the agency that makes the discriminatory decision, plaintiff is, indeed, without a remedy and the government is, in fact, exempt from judicial review.

CONCLUSION

For these reasons and the reasons

---

[1]The government also argued that Title VII would not address the allegation of discriminatory denial of counsel because it was not a "personnel" action covered by the statute or a "term, condition, or privilege of employment" under the law. The government also argued that Title VII remedies would not address a denial of counsel problem. See the attached section, Appendix A, from the Statement of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment filed in the district court and appearing as Pages 43 through 66 of the Appendix before the court of appeals. Pages 62 through 65 of the Appendix are attached as an exhibit.

set forth in the original Opposition, it is respectfully submitted that the Petition should not be granted.

Respectfully submitted,

JOHN D. GRAD
Hirschkop & Grad, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, VA 22313
(703) 836-6595

OWEN PERRY
3290 West Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR RESPONDENT

Of Counsel:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

September 1984

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVELYN FALKOWSKI, Plaintiff, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	)	Civil Action No. 81-1776

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT

* * *

2. Because plaintiff's Title VII Claim is not properly before this Court, and plaintiff cannot establish a prima facie case in regard to this claim in any event, this claim must also be dismissed.

Although Title VII of the Civil Rights Act of 1964 waives the sovereign immunity of the United States in certain limited situations, the plaintiff cannot

avail herself of that limited waiver of sovereign immunity in this case. This is so because Title VII is inapplicable to the discrimination and retaliation claim asserted against the EEOC and the plaintiff has not alleged compliance with the jurisdictional prerequisites for a Title VII action. The plaintiff has not alleged that she has exhausted the administrative remedies available to her under Title VII, which statute, in any event, provides neither for suits against federal agencies such as the EEOC nor for the award of relief such as is sought in this case by the plaintiff. Furthermore, even if the plaintiff could maintain a Title VII claim against the EEOC, because the Justice Department, rather than the EEOC, made the decision not to reimburse the plaintiff for her legal fees and the EEOC actually requested

that the Justice Department provide the plaintiff with legal counsel, no prima facie Title VII claim can be established against the EEOC. Finally, the plaintiff's Title VII claim is also fatally defective because even were she able to establish a prima facie case, legitimate and nondiscriminatory reasons existed for the denial of plaintiff's request for the reimbursement of her legal fees.

Section 717 of Title VII provides "an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." Brown v. General Services Administration, 425 U.S. 820, 829 (1976). As the Supreme Court held in Brown:

> Section 717(c) [42 U.S.C. §2000e-16(c)] permits an aggrieved employee to file a civil action in a federal district court to review his claim of employment discrimination. Attached to that right, however,

> are certain preconditions. Initially, the complainant must seek relief in the agency which has allegedly discriminated against him.

425 U.S. at 832. The plaintiff's Title VII cause of action therefore initially fails because she has not alleged that she has properly exhausted her Title VII administrative remedies on the specific claim asserted against the EEOC in this action.

The plaintiff's Title VII claim also must be rejected because it is brought directly against the EEOC. 42 U.S.C. §2000e-16(c) provides that in federal employee Title VII actions "the head of the department, agency, or unit, as appropriate, shall be the defendant." The courts have therefore repeatedly held that "[t]he only proper defendant in a Title VII suit...is the 'head of the department, agency, or unit' in which

the allegedly discriminatory acts transpired." Hackley v. Roudebush, 171 U.S. App. D.C. 376, 383 n.17, 520 F.2d 108, 115 n.17 (1975). See also Carter v. Marshall, 457 F.Supp. 38, 40 (D.D.C. 1978); Beckwith v. Hampton, 430 F.Supp. 183, 184 n.2 (D.D.C. 1977); Jones v. United States, 376 F.Supp. 13, 14 n.3 (D.D.C. 1974).

Even had the plaintiff complied with the procedural prerequisites for a Title VII action, though, this Court would be without jurisdiction to award to the plaintiff the relief which she seeks. "Federal employees are...provided with legal counsel in order to protect the interests of the Government, not the individual interests of the employee." Ryan v. United States, Slip Opinion, at 5 (emphasis in the original). The provision of legal counsel for federal

employees therefore constitutes neither a "personnel action" covered by 42 U.S.C. §2000e-16(a) nor a "term[], condition[], or privilege[] of employment" within the meaning of 42 U.S.C. §2000e-2. Furthermore, the affirmative relief which may be awarded to a federal employee under Title VII is restricted to "reinstatement or hiring of employees, with or without back pay..., or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). Thus, even had she stated a valid Title VII claim against the EEOC, the relief that the plaintiff seeks in this action,

consisting primarily of damages, cannot be awarded to her.[1]

Furthermore, even were plaintiff's Title VII claim properly before this Court, she could not make out a prima facie showing that EEOC discrimination or retaliation resulted in the denial of her request for reimbursement of her legal fees. See Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). By statute, 28 U.S.C. §517, and administrative order, 28 C.F.R. §§50.15 and 50.16, the Department of Justice is vested with the authority

---

[1]Because only equitable relief such as backpay is authorized by Title VII, "[a]ll of the circuits which have addressed the matter have concluded that 42 U.S.C. §2000e-5(g) does not authorize an award of either punitive or compensatory damages...." DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980). See also Neely v. Blumenthal, 458 F.Supp. 945, 950 (D.D.C. 1978); Kinsey v. Legg Mason Wood Walker, Inc., 16 EPD ¶8168 (D.D.C. 1978).

to provide legal representation to government employees sued in their individual capacities for actions taken within the scope of their employment. Thus because the plaintiff's Title VII claim, brought only against the EEOC, is premised upon the mistaken assumption that the EEOC, itself, had the authority to grant her request for reimbursement of legal fees, no prima facie case can be established in regard to that claim.

The plaintiff also cannot establish a prima facie Title VII case because EEOC officials requested that the Department of Justice authorize legal representation for the plaintiff on several occasions. Seibert Declaration, ¶¶5, 6, 8, 12. The EEOC thus did all that it could to secure such representation for Ms. Falkowski. It was the Department of Justice, which is not sued for either

retaliation or discrimination, which determined that it would not be in the interest for the United States to reimburse the plaintiff for her attorneys fees, and the Justice Department's decision can in no manner support a discrimination or retaliation charge against the EEOC. The plaintiff, therefore, could not establish a prima facie Title VII claim against the EEOC even were that claim properly before this Court.

Finally, even if plaintiff's Title VII claim was properly before this Court and the plaintiff could somehow establish a prima facie case in regard to that claim, "legitimate, nondiscriminatory reason[s]" for the denial of plaintiff's request for legal fees exist. McDonnell Douglas Corp. v. Green, 411 U.S. at 802. As detailed in the preceding section of this brief, pp. 18-20, supra, the

provision of a legal defense to Ms. Falkowski at government expense was most definitely not "in the interest of the United States." Therefore even were the plaintiff able to establish a prima facie case of EEOC retaliation or discrimination, her Title VII claim must be rejected because she was ineligible for the benefit that she sought.

The plaintiff's Title VII claim must, therefore, be dismissed.

* * *

Office - Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS,
CLERK

(5)

No. 83-2034

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

EVELYN FALKOWSKI,
Respondent.

SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
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3290 West Big Beaver Road
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Troy, Michigan 48084
COUNSEL FOR RESPONDENT

OF COUNSEL:
MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005
EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507
HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036
EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

NO. 83-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE,

Petitioner,

v.

EVELYN FALKOWSKI,

Respondent.

SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Second Supplemental Brief in Opposition to the Petition for a Writ of Certiorari is filed pursuant to Rule

22.6 of the Rules of this Court. Since the filing of respondent's original Brief in Opposition in this case, this Court has entertained oral argument in the case of Heckler v. Chaney, No. 83-1878, which the Department of Justice alleges in its Petition is a companion case to the instant matter. This Supplemental Brief will address the allegations of the government made upon oral argument which we believe belie the government's effort to link the instant case to the Chaney case.

STATEMENT

The government has taken the position in its Petition for a Writ of Certiorari that this case is similar to Heckler v. Chaney, No. 83-1878, presently before this Court. See, for example, Page 3 of the government's Reply Memorandum

in this case. In its Petition and Reply Memorandum, the government suggested even a consolidated argument upon this case and Heckler v. Chaney. At oral argument upon Heckler v. Chaney on December 3, 1984, the government stressed at that argument reasons for reversal that distinguish this case from the Chaney case.

ARGUMENT

The oral argument of Heckler v. Chaney distinguishes the instant case from Chaney. At its oral argument, the government stressed several points: first, the government stressed that Chaney involved judicial review of an investigative and enforcement decision, not unlike judicial review of the decision to bring a criminal prosecution. Second, and similarly, the government claimed that the decision of the United States Court of Appeals

for the District of Columbia, in Chaney, would establish a precedent of allowing the Food and Drug Administration to be forced into action merely by virtue of the filing of a citizen complaint. Third, the argument seemed to center on whether, as a threshold matter, the decision to enforce a portion of the Food and Drug laws is reviewable under the Administrative Procedure Act.

Irrespective of which way this Court resolves these issues, we respectfully submit that none of these issues are involved in the instant Falkowski case. The administrative decision reviewed in this case was not an enforcement decision of the type traditionally committed to agency discretion. Moreover, there is clearly "law to apply"--regulatory, statutory and constitutional--which controls the criteria by which the decision

to provide counsel to government employees is made. For this reason, as well, there is no threshold issue in this case as to whether the APA does apply.

CONCLUSION

For these reasons and the reasons set forth in the original Brief in Opposition and Supplemental Brief in Opposition, it is respectfully submitted that the Petition should not be granted.

Respectfully submitted,

JOHN D. GRAD
Hirschkop & Grad, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, VA 22313
(703) 836-6595

OWEN PERRY
3290 W. Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR RESPONDENT

Of Counsel:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.c. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

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